American Bar Association Journal

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July, 1957

This Month's Cover

On Sunday, July 28, the American Bar Association will dedicate a monument at Runnymede, in the County of Surrey, England, the site of one of the great events in the history of the English-speaking people, King John's granting of Magna Charta on June 15, 1215. Our cover this month depicts the scene on the banks of the Thames that June morning 742 years ago. The line drawing is by Charles W. Moser, of Chicago.

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East 60th Street, Chicago 37, Illinois. Entered as second class matter August 25, 1920, at the Post Office at Chicago, Illinois, under the act of August 24, 1912. Price per copy, 75¢; to Members, 50¢; per year, $5.00; to Members, $2.50; to Students in Law Schools, $3.00; to Members of the American Law Student Association, $1.50.

Vol. 43, No. ". Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.

The President's Page

David F. Maxwell

It seems incredible that this will be my last message as your President; for time has literally flown by as we have attempted to telescope a year's activities into eleven short months. To review the record of the Association's achievements during the current term would be pointless. The strength of our Association stems from the continuity of leadership and the development of projects from one administration to another.

Just as the finished business of 1957 was the culmination of efforts expended by hundreds of devoted and dedicated members in many fields, so the fruits of the year to come will grow from seeds planted now. Therein lies the strength of our Association.

One example of the spirit which impels us forward and the results it will produce in the public interest is reflected by a report just completed by the research staff of the Cromwell Library under the direction of John C. Leary.

It shows that the House of Delegates or the Board of Governors during calendar years 1955, 1956 and 1957 through the May meeting of the Board adopted one hundred and thirteen resolutions pertaining to forty bills and one House Resolution introduced in the 84th and 85th Congress. The subjects covered in that short span are as numerous and varied as those offered in an average law school curriculum and range from administrative law to taxation.

Numerous inquiries received from time to time from our own members as well as from members of the Congress regarding the attitude of the Association toward pending legislation led to the preparation of the report, the first of its kind in the history of the Association. The study is carefully indexed under subjects and bill numbers and lists the Section or Committee of the Association sponsoring each resolution.

To each Committee or Section is generally entrusted the responsibility for implementing the Association's action by advocating its position before the appropriate Senate or House Committee and by following the progress of the particular bill in Congress. Effective action in this respect requires constant liaison with the staff of the congressional committee by the Association's representative who must be available to testify and for consultation upon short notice. For our voluntary members to function in this manner imposes an intolerable burden, because they are frequently far from the nation's capital and have an inadequate expense allowance and no technical assistance available.

Furthermore, it is virtually impossible in view of the ever-increasing number of bills introduced in the Congress for any Section or Committee to be informed of the detail of all legislation which may be inimical to the interest of the Association.

Therefore, the Association proposes to:

1. Engage a competent lawyer as director for the Washington office. He will be charged with the duty of co-operating with Committees and Sections of the Association in expediting its legislative program and will also be available for such technical assistance as may be necessary in the field.

2. Expand the jurisdiction of the Special Washington Committee to make its services available to all Sections and Committees in connection with either pending bills or proposed bills requiring congressional sponsorship.

3. Maintain the roster of bills as prepared by the Cromwell Library on a permanent basis so that the position of the Association with respect to any bill may be ascertained instantly without requiring tedious and time-consuming examination of old records.

Lest anyone misunderstand, it should be made abundantly clear that none of this contemplates lobbying within the accepted definition of the term by the Association or by anyone in its behalf. The director of the Washington office will have no authority to discuss pending legislation with any member of the Congress nor will he attempt in any manner to influence legislation.

The function of keeping the members of Congress informed as to the position of the Association on bills clearly falling within the purposes of the Association and affecting the public interest will continue to be performed by the members of the Association to whom specific mandate is given by the House of Delegates or the Board of Governors. As-

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Views of Our Readers

▪ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.

The Warsaw Convention Is Not So Outrageous

I have read with attention Clifford N. Gardner's advice to our fellow-members who "Are Going To Fly to London", in the May issue of the JOURNAL at page 412. Mr. Gardner seems annoyed at the terms of the Warsaw Convention, which practically guarantees that the air passengers to London will get up to $8,300 for any injury without proof whatever that the carrier is negligent.

In Mr. Gardner's own State of Minnesota, the top limit for wrongful death is only $17,500, and the plaintiff also has the burden of proof. In Wisconsin, the limit is only $15,000, likewise in Indiana. In Colorado it is $10,000. Quite recently the Colorado limit was $5,000. May we suppose that Mr. Gardner also thinks those limits are "the greatest writing since the advent of paper money"?

The Warsaw Convention reverses our usual rule as to burden of proof. In that aspect it is like workmen's compensation. Is that something to be publicly denounced?

The JOURNAL perhaps may not ethically tell us where and how to insure. But any broker can get us an annual policy for travel hazards, by ship, train, hired car, bus, moving staircase, with high coverage and low cost. In the famous "Elizabeth" accident when Secretary Patterson lost his life, it was quickly announced that sundry passengers had $800,000 of personal accident policies, which paid within a week. Those who luxuriate in negligence lawsuits are still litigating those accidents which happened in 1951-1952.

Our Bar Association has a program of life insurance which I believe covers travel risks, including air. That eases any alarms aroused by Mr. Gardner's warning.

What concerns me is that Mr. Gardner has not seen that his own state and several populous neighbor states also place top limits on death lawsuits, and also compel the passenger plaintiff to prove the carrier's negligence, a heavy burden which the Warsaw Convention eases.

European lawyers are astonished by the chaos of our forty-eight state death laws. Our time limits are a trap for the unwary. Minnesota allows three years, but Wisconsin allows two, while Illinois, Pennsylvania and California allow only one. And Maryland allows eighteen months. The Warsaw Convention allows a standard two years and now governs in over ninety countries and colonies and territories. There are no tricky time variations from country to country.

One wonders why Mr. Gardner cites the *Ulen* case: that passenger recovered what the jury verdict found to be her damage, $25,000. He cites the *Froman* case: It may fairly be observed that Miss Froman alleged that the pilot was negligent; that the pilot took the stand and testified as to what he did; and that the jury believed him. It is also noteworthy that the co-pilot was not called to the stand by her counsel to contradict the pilot. In Minnesota a verdict of no negligence defeats the plaintiff utterly; under the Convention, Miss Froman still got $8,300.

Under our present-day American negligence system, many passengers by air, by rail and on the highway daily bear their own losses. Dean Pound, with his usual farsighted wisdom, has pointed out that our negligence law is hitched to horses and buggies and is not geared to the modern machine—16 *NACCA Journal*, page 1.

In the personal accident field, there is much to think about and to reform. I suggest, however, that the Warsaw Convention is not such a bad boy. In an aviation world among a large number of nations with widely differing systems of law, it is fairer than most, and money-wise is not so different from Minnesota and Indiana and Colorado.

The real trouble with air travel is the uncertainty of winds and fogs.

"If you have time to spare, you may travel by air" is an old by-line. Thousands of us are going to London by ship.

Happy Landings to all.

ARNOLD W. KNAUTH
New York, New York

Admission to Practice in the First Circuit

Mr. Williamson's article entitled "Disparate Rules of Admission in Federal Courts", in the August, 1956, issue of the JOURNAL, has been called to my attention.

First, he commends the United States Courts of Appeals in seven circuits for requiring "only the accreditation for admittance to the Supreme Court of the United States". He refers to these circuits as "open land".

Then he attacks three circuits as maintaining "moats and lower battlements" against admission of attorneys and directs his initial and most lethal charge against the First Circuit as requiring that "the attorney must have been previously admitted to practice in some other *United States appellate court*" [Italics supplied].

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American Bar Association Journal

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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral and Natural Resources Law, $5.00; Municipal Law, $3.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $3.00; Real Property, Probate and Trust Law, $5.00; Taxation, $6.00.

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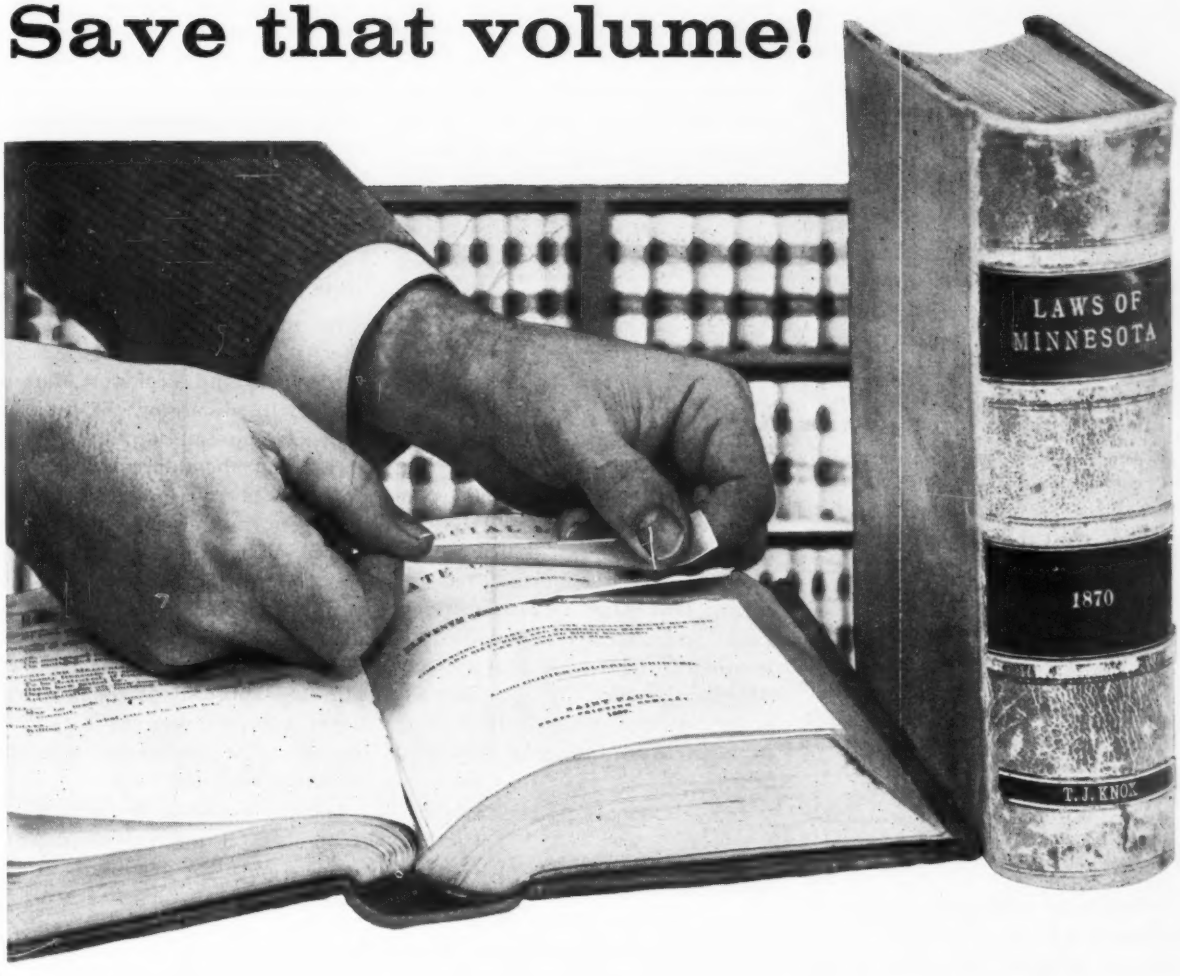

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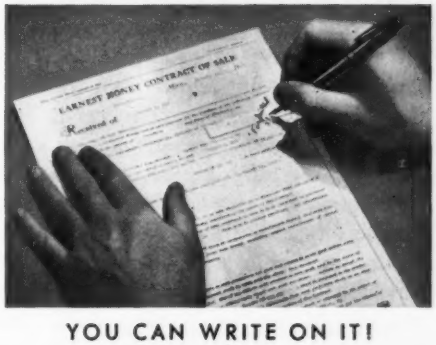

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PRODUCT OF 3M COMPANY RESEARCH

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Rule 7 of the Rules of the First Circuit reads in part as follows: "Any attorney or counsellor who has been admitted to practice in the Supreme Court of the United States, any other United States court of appeals, *any United States district court, or the highest appellate court of any state, commonwealth or territory* . . . may be admitted to practice in this court . . ." [Italics supplied]. This rule has been in effect since the revision of July 1, 1953. For several decades prior thereto, Rule 7 in all of the revisions contained, among the alternative bar accreditations, the words "or any United States district court". There is no excuse for the error of Mr. Williamson in representing that the Rules of the First Circuit require that an attorney must have been previously admitted to practice in some other *United States appellate court.* This groundless accusation should be retracted.

Mr. Williamson represents that the Courts of Appeals for seven circuits require only the accreditation necessary for admittance to the Supreme Court of the United States, and he refers to the Rules of that Court as being lenient. Since our admission requirements are so extremely liberal, I am constrained to observe that, although Mr. Williamson's "accredited legal traveler may journey with ease into the highest court in the land", such traveler may journey with even greater ease into the Court of Appeals for the First Circuit. We do not require that the applicant have been a member of the qualifying Bar for any period, whereas paragraph 1 of Rule 5 of the Supreme Court requires such membership "for three years past"; we do not require a certificate or a personal statement endorsed by two members of the Bar, whereas paragraph 2 of Rule 5 of the Supreme Court does; and we charge no fee at all for admission, whereas Rule 52 (f) of the Supreme Court requires a fee of $25.00, and several Courts of Appeals make a charge therefor. The foregoing comments are intended to show by comparison that the requirements of the First Circuit are even more liberal than those of the Supreme Court of the United States; and these comments are made with full appreciation of the worthiness of the requirements for admission to the Bar of the Supreme Court of the United States as set forth in its Rules 5 and 52 (f).

Finally, carelessness in research is evident in the fourth paragraph of Mr. Williamson's article. There he refers to the requirements for admission to the Bar of the Supreme Court and he cites "United States Supreme Court Rules 2 and 3". Under the former rules of that Court, Rule 2 covered admission requirements; and Rule 3 concerned law clerks and secretaries. Actually, the requirements for admission are contained in Rule 5 in the Revised Rules of that Court which have been in effect for more than two years.

ROGER A. STINCHFIELD
Clerk.
United States Court of Appeals
Boston, Massachusetts

[Note: the editor regrets that this inaccuracy occurred and that it was not acknowledged in an earlier issue.]

One of Our Authors Amends a Statement

In my article, "The Good Law School," 42 A.B.A.J. 1123, 1125, I stated that most schools do not add or deduct exam credit for oral classroom performance and that "the present rules of the Association of American Law Schools do not allow this mode of evaluation". This statement provoked a great deal of comment and denials. Finally, Dean Griswold of the Harvard Law School, this year's President-Elect of the Association, told me expressly that *no such rigid rule exists,* which would forbid law schools to evaluate the students' oral class work in connection with their final examinations.

My article made it clear, of course, that I did not like what I thought to be a "must" rule. I am very glad, indeed, to recant.

REGINALD PARKER
Willamette University
Salem, Oregon

The F.P.C. and State Jurisdiction

In the February issue of the JOURNAL (page 131), Mr. Benjamin Wham and Professor Maurice H. Merrill, discussing the problem of federal pre-emption, refer to the decision of the Supreme Court in the *Phillips* case as appearing to have gone contrary to the expressly indicated congressional intention to preserve state jurisdiction over the local production and sale of natural gas, but "nevertheless the Federal Power Commission encroached, with the approval of the Supreme Court, upon the reserved State jurisdiction". The implication is hardly in accord with the facts.

Having joined with the Solicitor General in a petition to the Supreme Court for certiorari to the Court of Appeals for the District of Columbia Circuit and in the Supreme Court brief on the merits in urging in the *Phillips* case (347 U.S. 672) that the lower court was in error in holding that the Federal Power Commission had jurisdiction over sales by independent producers, I thought the Commission, rather than encroaching upon the reserved state jurisdiction over production, as the article states, had been urging that the courts find sales by producers to be outside of its jurisdiction. The title of one of the cases with the *Phillips* case, No. 418, *F.P.C.* v. *Wisconsin,* and in the lower court, *Wisconsin* v. *F.P.C.,* 205 F. 2d 705, and the remarks of the Supreme Court, especially its last footnote on page 712, should have indicated to these gentlemen that the Commission had resisted jurisdiction over independent producers consistently. Moreover, the

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BETTER THINGS FOR BETTER LIVING . . . *THROUGH CHEMISTRY*

(Continued from page 586)

Commission repeatedly disclaimed jurisdiction over independent producers in every case coming before it up until the time of the *Phillips* decision; *e.g., Columbian Fuel Corporation* v. *F.P.C.*, 239 F. 2d 61 (D.C. Cir. 1956). Since the *Phillips* decision the Commission has recommended passage of amendatory legislation to deal with independent producers on a different basis.

At the end of the interstate transmission of natural gas, the Federal Power Commission recommended passage of the so-called Hinshaw amendment (68 Stat. 36) further limiting the Commission's jurisdiction over sales by a natural gas company which purchases the gas at the border of or within a state in which the gas is resold and consumed. As pointed out by the House Committee reporting the Hinshaw bill, H. Rep. No. 899, 83d Cong., 1st Sess., the Commission had been recommending remedial legislation of this nature since 1951 when it issued its Opinion No. 216 in *Texas Illinois Natural Gas Pipeline Co.* (10 F.P.C. 235).

From the foregoing, it would seem that the Federal Power Commission has not been seeking to encroach on state prerogatives in the respects mentioned.

WILLARD W. GATCHELL
General Counsel
Federal Power Commission

The Byrd-Bridges Amendment Again

In an article published in the January, 1957, issue of the JOURNAL, on page 35, I discussed the measure introduced in the Senate by Senators Byrd and Bridges in January, 1956, proposing an amendment to the Constitution of the United States to require the balancing of the budget. This resolution, with a few slight changes, was introduced in the Senate on January 22, 1957, by Senator Bridges with the co-sponsorship of Senators Byrd, Curtis and Langer, and in the House on January 31, 1957, by Congressman Ralph W. Gwinn. The resolutions are numbered S. J. Res. 36 and H. J. Res. 214, respectively.

In further support of the argument contained in my article published in the January issue, I quote from a statement issued June 20, 1955, by Dr. Willford I. King, economist for the Committee for Constitutional Government, as follows:

> In our nation, the latest instance of robbery on a grandiose scale took place between 1939 and 1951. In that period, because of failure to balance the national budget and resulting inflation, the general price level *rose* some 112%. This advance reduced by more than half the value of all property rights payable in terms of money. Amounts lost by some of the victims of this robbery are very roughly approximated by the following figures, measured in dollars of 1955 value:

	Billions
Owners of bank deposits	$ 135
Beneficiaries of life insurance policies	152
Holders of U.S. Savings Bonds	40
	$ 327

To secure a complete total, there should be added to this sum the losses incurred by holders of miscellaneous notes, mortgages, and bonds; but accurate figures for these items are not available. However, sample data above presented indicate the magnitude of the latest robbery brought about by failure to keep our money on a sound basis.

ROBERT B. DRESSER
Providence, Rhode Island

The Causes of Court Congestion

The "Three Views on Court Congestion" appearing in the December issue were most enlightening and I trust that there will be more "views" published with respect to this subject matter.

It is my observation that court calendars are unduly congested for a number of reasons and that no one of them is the sole cause. Neither will the elimination of one contributing cause bring the calendars up to date. For the purpose of this letter, I shall attempt to point out the more egregious of the contributing factors.

At the outset, litigants and lawyers alike seem to be of the impression that courts exist for the purpose of compromising lawsuits with the aid and intervention of the judiciary. The result is that little or no serious effort is made by the litigants and their attorneys to compromise before instituting suit. In fact, the knowledge that the judiciary will participate in effecting a compromise is tantamount to inviting congested court calendars. Our courts are not organized as arbitration societies, but for the trial of substantial issues of law and fact on the merits. It was never intended that a judge of any court should act as a claims adjuster, yet this is precisely what many of them are doing. How can a jurist be impartial when in the course of attempting to effect a compromise, he must neces-

sarily become partial? He must, if he acts in good conscience, seek to determine if plaintiff has a meritorious cause of action, without the benefit of sworn testimony or other legal evidence. Having determined that plaintiff has a meritorious cause of action, the jurist proceeds to induce the defendant to pay some money to compromise the lawsuit. In so doing, the jurist has become partial. On the other hand, if a jurist refuses to participate in any respect in the compromise of litigation and lawyers and litigants learn that when in court they must try a case, there is little doubt that fewer lawsuits will be instituted and that lawyers and litigants will make sincere efforts to compromise their lawsuits before undertaking to try a case. The net result will be an automatic reduction in the congestion of court calendars.

To facilitate the trials of those cases which must be tried, we should have a trial Bar composed only of those who are thoroughly experienced in the trial of litigated matters. This too, would serve to reduce the number of cases to be tried, since, among other reasons, members of a trial Bar would be unwilling to waste their time trying unworthy causes. Trials conducted by experienced trial lawyers would consume less time than is consumed by one who is untrained and unskilled in courtroom practices, etc. Last, but not least, meritorious causes are less likely to be "lost" by skilled trial lawyers. And, above all, the hearts and minds of jurists, lawyers and litigants should react violently against all offense against the canons of decency and fairness which express the notions of justice of English-speaking peoples.

E. F. W. Wildermuth

Jamaica, New York

Judicial Reform and The Christian Century

I read with great interest the article in the April, 1957, issue of the Journal referring to editorials from *The Christian Century* discussing the question whether the legal profession has properly discharged its responsibility in solving the problem of court congestion. I think you have rendered a great service in bringing this important matter to the attention of your readers.

I have worked for some time on judicial reform in Illinois, which you cite as one of the states in which major reorganization programs are being advanced by the Bar, and feel that the criticism contained in the editorials referred to is healthy and should be seriously considered by the legal profession. In all frankness, I must add however that I was disappointed in the last paragraph of your editorial chiding *The Christian Century* for not having by this time "abolished sin". In my opinion it is neither a proper analogy nor apt response to the vital message *The Christian Century* seeks to convey to Bench and Bar.

Louis A. Kohn

Chicago, Illinois

Lawyers Should Be Addressed "Esq."

In a letter on page 400 of your May issue, Franklin A. Thayer, Esq., called attention to the need for an identifying title to distinguish lawyers, and suggested coining the title "Cr." for this purpose.

But why not resurrect the time-honored title "Esq."?

Back in Massachusetts in 1910 when I was admitted to the Bar all lawyers addressed each other in this manner and most laymen addressed lawyers in the same way.

Therefore I suggest that the American Bar Association adopt an appropriate resolution sponsoring a drive to popularize the title "Esq."

Roger Sherman Hoar

Milwaukee, Wisconsin

He Likes "Cr." As a Title for Lawyers

I heartily support the views expressed by Mr. Franklin Thayer in his letter printed in the May issue of the Journal regarding the use of "Cr." (Counsellor) as the title for the legal profession, much as that of "Dr." (Doctor) used by the medical profession. This should tend to further strengthen the professional status of the law, in the eyes of the public.

J. R. Coffey

Prairie Village, Kansas

Army Officers Can't Administer Justice

The frenzied letters attacking Mr. Jacques' indictment of military justice are a pretty good indication that he came very close to the truth.

My twenty-one months as an enlisted man doing Judge Advocate work left me with two strong impressions. First, Army officers try very hard to give the accused a fair trial. Second, by their very training they are totally incapable of administering justice.

An example of this deficiency is the special court of three officers which exonerated a defendant. They were thereafter called before the post executive officer and berated for their decision. You may be sure these men felt out the political climate the next time they exercised their function as jurors.

The second instance is the captain who proclaimed loudly that the trials were unnecessary, as the Army never brought charges against a man unless he was guilty. Within a month this man was a member of a court.

The solution for this situation is necessarily a complex one. I do not believe that the basic fault lies with the substantive portions of the Uniform Code of Military Justice. It lies rather with the personnel of the court. The UCMJ provides for enlisted personnel to sit on courts martial. In practice this provision has been nullified by appointing only master sergeants to the court. A trial by one's peers—in some cases fellow privates—should be provided for.

A second major improvement would be achieved if a lawyer were to preside over special courts martial which now have a sentencing power up to six months.

James D. Griffith

Chicago, Illinois

(Continued on page 620)

Results of Election for State Delegates

Jurisdiction	Delegates Elected	Ballots Mailed	Ballots Returned	Percent of Return
ARIZONA	Walter E. Craig Phoenix	543	245	45
CONNECTICUT	Charles W. Pettengill Greenwich	1325	439	33
DISTRICT OF COLUMBIA	Francis W. Hill Washington	2991	947	32
ILLINOIS	Benjamin Wham Chicago	5450	2118	39
IOWA	Ingalls Swisher Iowa City	1291	635	49
MAINE	David A. Nichols Camden	283	140	49
MICHIGAN	Henry L. Woolfenden Detroit	2438	1362	56
MINNESOTA (Vacancy)	*John B. Burke St. Paul	1226	701	57
MISSISSIPPI	John C. Satterfield Jackson	615	326	53
MONTANA	Julius J. Wuerthner Great Falls	347	266	77
NEBRASKA	George H. Turner Lincoln	798	422	53
NEW HAMPSHIRE (Vacancy)	*Robert W. Upton Concord	255	142	56
NEW JERSEY	Sylvester C. Smith, Jr. Newark	1893	806	43
OKLAHOMA	Howard T. Tumilty Oklahoma City	1351	645	48
PUERTO RICO	Francisco Ponsa-Feliu San Juan	80	22	28
SOUTH CAROLINA	Walton J. McLeod, Jr. Walterboro	550	266	48
SOUTH DAKOTA	Roy E. Willy Sioux Falls	266	136	51
TEXAS	James L. Shepherd, Jr. Houston	3845	1849	48
VIRGINIA (Vacancy)	**Lewis F. Powell, Jr. Richmond	1916	1198	63
WASHINGTON	Richard S. Munter Spokane	1478	686	46
WYOMING	Edward E. Murane Casper	245	153	62
		29,186	13,504	46%

*To fill vacancy expiring with adjournment of 1958 Annual Meeting
**To fill vacancy expiring with adjournment of 1959 Annual Meeting

The United States Supreme Court:

Symbol of Orderly, Stable and Just Government

by Herbert Brownell, Jr. • *Attorney General of the United States*

Mr. Brownell points out that the umpire is never a favorite with anyone, no matter how right he may be. And the Supreme Court, as the umpire of our great legal controversies, has been the target of bitter criticism throughout its history, some of the heaviest bricks thrown at it including those tossed by Jefferson, Lincoln and the late Senator Borah. In spite of it all, the Court today is the recognized and unchallenged arbiter of equal justice under law. In this article, originally an address prepared for delivery at the Fifty-Fifth Annual Banquet of the Columbia Law Review, the Attorney General discusses the history of the Court and some of its decisions, now landmarks of constitutional law, that aroused a storm of controversy when they were first handed down.

From decade to decade in our history, the Supreme Court has been the center of storms of controversy and sectional rancor. Out of every tempest, it has emerged with enhanced prestige, the most highly esteemed judicial tribunal in the world.

At times, the Court has been accused of being too reactionary; at other times, too radical. And there have been periods during which it has been simultaneously the target of both the conservative and liberal groups in our nation. It is important at this time for all of our people, and particularly for our lawyers, to view the role of the Court in its proper perspective.

At the time of the adoption of the Constitution, our founding fathers sought to charter a government which would not be so all-powerful as to threaten individual liberty or desirable local autonomy and yet be strong enough to foster our growth, well-being and eminence as a great nation.

In order to strike the right balance by which these two objectives could be achieved, the Constitution granted certain powers to the executive, legislative and judicial branches of the Government which would constitute checks and balances upon each other. It reserved the balance to the states. By these means, it was hoped to prevent undue concentration of governmental power in the hands of any one segment—the first step to despotism.

The Supreme Court . . . *A Legal Umpire*

Those of us who attend ball games know that there is one man on the field who is never a favorite with anyone. He is the umpire of our national pastime. Every time he "calls a close one", he is "panned" by one team or the other and by the fans, no matter how right he may be. How true this is of our Supreme Court. It is the national umpire of all great legal controversies.

The history of our nation is reflected in about 350 volumes of the United States Supreme Court Reports. It contains the story of struggles for power between state and federal governments; the contests between centralization and local rule; the conflicts between creditor and debtor classes; the tugs between economic concentration and individual enterprise; the reconciliation of the nation's security, safety and man's liberties.

There have been many periods in our history when, regrettably, sectionalism and self-interest have so befogged the real issues that the importance of the Court's decisions to the strength and growth of the country have been temporarily obscured.

The earliest attack against the Supreme Court was directed by Jefferson because the Court had undertaken to pass upon the constitutionality of a congressional act. In *Marbury* v. *Madison*, Chief Justice Marshall laid down the principle that it was "the province and duty of the judicial department to say what the law is", and that, if a statute of Congress and the Constitution collide, the former must yield since the Constitution is the supreme law of

the land. There were no precedents for such a holding in this country. It was contrary to English law where Parliament was almost omnipotent. Men like Jefferson felt that each department of government should pass on its own exercise of authority. They were critical of the decision of the Court in *Marbury* v. *Madison* as a despotic usurpation of power.

Today, we recognize that there would be little, if anything, left of our constitutional rights, if the Court were precluded from holding that laws repugnant to the Constitution are void. Our right to freedom of speech, press, religion, our right to a fair trial, the right not to be deprived of property without due process, and all other cherished rights would be in constant jeopardy if the Supreme Court did not have the last word over the constitutionality of statutes—federal or state.

The attack against the Supreme Court's power to pass upon constitutionality of state statutes also came during Marshall's day. Under Section 25 of the Judiciary Act of 1789, the Supreme Court was given appellate jurisdiction to review state statutes or the judgments of state courts involving the validity of a treaty or statute of the United States. State courts and legislatures, jealous of their authority, promptly denied the jurisdiction of the federal courts to review state court decisions. Granting a writ of mandamus in *United States* v. *Peters*, a Pennsylvania case, the Court, through Chief Justice Marshall, said:

> If the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights under those judgments, the Constitution itself becomes a solemn mockery; and the Nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.

Pennsylvania called out its troops to prevent service of the federal writ. The United States Marshal deputized a posse of 2,000 men to enforce it. President Madison was asked to withdraw the posse, but he refused. Only then did the Pennsylvania legislature agree to satisfy the judgment. Shortly thereafter the general of the Pennsylvania militia and several of his men who obstructed the service of the federal writ were indicted and convicted. An enraged Pennsylvania legislature called for an amendment to the Constitution establishing an impartial tribunal to determine disputes between the federal and state governments, but the proposal received little support from the other states. Among these states stood Virginia which declared that the Supreme Court was "more eminently qualified . . . to decide the dispute . . . in an enlightened and informed manner, than any other tribunal which could be created." But a few years later, in 1816, the Virginia Court of Appeals refused to obey a mandate of the Supreme Court, claiming that Section 25 of the Judiciary Act was unconstitutional and that the highest state courts were not inferior to the Supreme Court of the United States.

A Series of Attacks . . . *McCulloch* v. *Maryland*

Beginning in 1819, the Supreme Court was the subject of another series of bitter attacks. Its decisions in *McCulloch* v. *Maryland*, invalidating the state law taxing the Bank of the United States, aroused great opposition. It was claimed that the decision dealt a deadly blow to the sovereignty of the states. A similar decision involved the State of Ohio which had adopted a resolution refusing to be bound by *McCulloch* v. *Maryland* and reasserting the famous nullification resolutions of Kentucky of 1798 and 1799. Next, Virginia was provoked by the Court's decision in *Cohens* v. *Virginia*, which upheld the supremacy of the federal court in criminal as well as civil cases where federal questions were involved. South Carolina joined in the assault when Mr. Justice Johnson, himself a South Carolinian, held unconstitutional a state statute dealing with the entrance of free Negroes. Kentucky complained that the Supreme Court had wrongfully declared unconstitutional its laws for the protection of landowners and judgment debtors. The Court held the Steamboat monopoly under New York laws to be invalid. There were few states whose acts escaped reversal; criticism of the Court became almost nationwide.

During this period, various plans were advanced for curtailing the Court's powers. One plan would have transferred appellate jurisdiction to the Senate in cases involving conflict between the Constitution and laws of the United States and of the several states. Another would have required the concurrence of two thirds of the members of the Court in any case involving a constitutional question. Still another would have required concurrence of five of the seven judges in decisions invalidating state statutes. There were also attempts to pack the Court.

As we look back upon the Supreme Court during the thirty-four year period that Marshall was Chief Justice, it would appear that it seemed to be going from one crisis to the next, but always rising to the challenge on each occasion.

Consider for a moment the consequences, if Marshall's Court had capitulated and the Court's power to decide these great constitutional questions had been taken away.

Consider, for example, the benefit to the country resulting from the Court's decision in *McCulloch* v. *Maryland*. In upholding the powers of the National Bank, Marshall gave impetus to more conservative banking, to stabilization of the national currency, and to facilitation of sounder trade and exchange practices throughout the country. The decision setting aside the New York Steamboat monopoly set a precedent enabling the government to avoid commercial wars and trade barriers affecting our interstate commerce. These were precisely the defects of the league of states that the framers of the Constitution had intended to avert. Our vast interstate and foreign commerce now knows no state barriers, border duties, or retaliatory measures such as have hindered commerce abroad all these years.

In 1836, Roger B. Taney replaced Marshall as Chief Justice on the Court. Criticism of the Court did not abate with Taney's appointment—it merely came from different directions.

The *Dred Scott* case, you will recall, was one of Taney's decisions. It aroused great hostility in the North. The decision was savagely assailed by anti-slavery Congressmen and Senators and by the anti-slavery press. The Court was described as "a citadel of slavery".

Yet, although Lincoln was critical of the opinion, he was most careful not to impugn the integrity of the Court. In a debate with Douglas in 1857, Lincoln declared:

> We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous.

Instead of urging defiance of the decision, Lincoln said:

> We know the court that made it, has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it.

In debate a year later, Lincoln reaffirmed the importance of compliance with the Court's decisions saying:

> The courts are the tribunals prescribed by the Constitution and created by the authority of the people to determine, expound and enforce the law. Hence, whoever resists the final decision of the highest judicial tribunal, aims a deadly blow to our whole Republican system of government—a blow, which if successful would place all our rights and liberties at the mercy of passion, anarchy and violence.

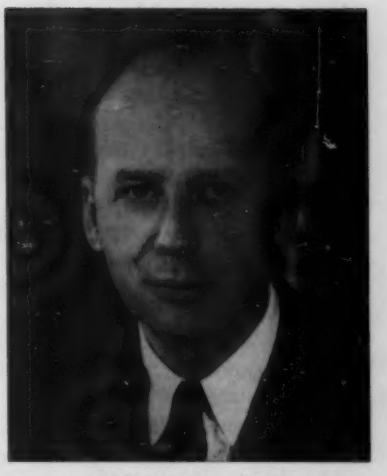
Another famous case of the day involved the State of Wisconsin. One Booth, an abolitionist editor, was convicted in a federal court of violating the federal fugitive slave law. In a vigorous exposition of the law, Chief Justice Taney sustained the supremacy of federal jurisdiction under the Constitution. Taney declared that "local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals."

There were other fundamental principles laid down in this case which are all too often forgotten. Taney declared that the judicial power is "indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the states from any encroachment upon their reserved rights by the Federal Government". He said also that, if the Court had not been established as the final arbiter of controversies between the United States and the States, "internal tranquility could not have been preserved". If these conflicts were left to be resolved by force, he warned, "our Government, State and National, would soon cease to be a Government of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions".

Now, it was the Wisconsin court and the Wisconsin legislature that adopted the policy of nullification. Finally, however, the anger subsided and the Wisconsin court accepted the judgment of the federal court.

The Civil War . . . *Ex parte Milligan*

During and after the Civil War, attacks upon the Court continued. In 1864, Salmon P. Chase succeeded Taney as Chief Justice. The *Milligan* decision in 1866, freeing a citizen who had been tried by a military court while the civil courts were open, provoked another assault. The Court's opinion laying down "a law for rulers and people, equally in war and in peace" was referred to then as "twaddle". It was urged that the Court should be reorganized by the addition of judges who would be responsive to the views of the people on the subject of reconstruction. A bill was introduced taking away the Court's appellate jurisdiction. Today, this decision is regarded as one of the bulwarks of American freedom.



Herbert Brownell, Jr.

Two years later, the Court was called on in *Texas* v. *White* to decide a significant case involving the status of the seceding states. Texas brought suit to enjoin payment of certain bonds owned by the state prior to the war and negotiated by the Confederate state government. A primary question was whether Texas, having seceded and not yet represented in Congress, was still out of the Union and therefore lacking in capacity to sue. The Court ruled that under the Constitution Texas had always remained a State of the Union. This was so, Chase declared, because "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

This opinion by Chase, an appointee of Lincoln's, helped to reunite a nation which had been divided by civil war. It gave the Southern States their just standing as states at a critical point in the Reconstruction period. The decision was not free from criticism. Thaddeus Stevens and others in Congress lashed out at it because they con-

sidered Congress could treat the seceding states as it chose, without regard to constitutional restraints.

In the Reconstruction period the Court fared no better. The Legal Tender Acts were passed during the Civil War to enable the Union to finance the war effort through issuance of paper money. Under these Acts, creditors were required to accept these debased paper dollars in discharge of outstanding debts. The validity of the acts was soon challenged by creditors, and when the matter first reached the Court in 1870, they were held invalid by a four-to-three decision.

The decision evoked a storm of protest from thousands of debtors. At the time there were two unfilled vacancies in the Court.

On the day the decision was handed down, President Grant sent to the Senate the names of William Strong and Joseph P. Bradley to fill the two vacancies. The Senate promptly confirmed and, in less than a week, the Attorney General petitioned the Court to reconsider the decision. The Court agreed, and a year later reversed itself and upheld the Act, five to four, upon the ground that the power to use legal tender notes to finance the war was implied from the power to wage war and to preserve the Union.

Now it was the creditors who denounced the Court. President Grant was accused of "packing" the Court and of making it a political instrument subservient to him. While historians reject this view, claiming that the decision to nominate Bradley and Strong had been reached before the first Legal Tender decision was decided, it was not believed at the time, and the Court's standing was damaged. Yet the soundness of the later decision has never been questioned and is now beyond dispute.

The Court's decisions in the next twenty years had profound significance in the field of civil rights. The Slaughter House Cases in 1873 held that it was not the purpose of the Fourteenth Amendment to transfer to the Federal Government and bring within the control of Congress the area of civil rights which theretofore had been exclusively the subject of state regulation. In the Civil Rights Cases decided in 1883, the Civil Rights Act of 1875, with respect to equal enjoyment of inns, public conveyances and places of amusement, was held invalid. These decisions were condemned in the North as making a mockery of the Fourteenth Amendment. In the South, they were commended for their soundness and supported as preserving the substance of our dual form of government. As each unpopular decision was rendered, those dissatisfied called for a drastic revision of the Court's power.

For lack of space we must skip over half a century. In the 1920's, came new proposals to restrict the Court's powers. One was advanced by Senator Borah. He proposed that seven out of nine judges should be required to concur in pronouncing any Act of Congress invalid. Senator LaFollette had a more extreme plan. Under it, no inferior federal judge could set aside a law of Congress on the ground that it was unconstitutional, and if the Supreme Court should do so, Congress could, by repassing it, nullify the action of the Court. Both of these plans were denounced by leading members of the Bar as destroying an important check upon arbitrary legislative action and finally were abandoned.

A New Torrent of Criticism . . . *The Segregation Cases*

Recently, the Court again has been the subject of a torrent of criticism because of its decisions in the Segregation Cases. Its critics have also seized on recent decisions invalidating state law and state judicial action as indicating a trend of judicial encroachment on the sovereignty of the states.

These decisions, like those already discussed, make clear what must be evident now to every student of law and history—that the states' rights issue is inherent in our form of government and is bound to recur again and again.

Nineteen Senators representing eleven states, and seventy-seven House members representing a considerable number of states have filed with the Congress a document entitled "Declaration of Constitutional Principles". In this Declaration, commonly known as the "Southern Manifesto", it is asserted that the decision of the Court in the Segregation Cases is a "clear abuse of judicial power"; and that "it climaxes a trend in the Federal Judiciary undertaking to legislate in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people."

This is not the place to reargue the Segregation Cases. Every contention which the Manifesto asserts was exhaustively treated in lengthy briefs and carefully considered by the Court. It would be superfluous to add to what was so eloquently and persuasively said by the Court. It would be well, however, to review the course of action taken by the Court in these cases.

The Segregation decisions were reached only after the greatest care and consideration. No issue could have received more deliberate treatment by a court. The matter was argued and reargued. After reargument, the Court in a unanimous opinion rendered on May 17, 1954, outlawed racial segregation in the public schools of the United States.

The Court ordered still another argument on the form of relief and invited the attorneys general of all the states requiring or permitting school segregation to present their views. Finally, on May 31, 1955, the Court again unanimously rendered its judgment. This was more than three years after the case had been docketed. Even then, the action taken by it was a moderate one. It directed the lower courts to enter "such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases". The Court thereby established a reasonable method by which the transition

to integration could take place. This was done in full recognition of the delicate social adjustments to be made. However, the Court made it clear "that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them".

The Manifesto is critical of the Court's opinion upon the ground that neither the original Constitution nor the Fourteenth Amendment nor any other amendment mentions education.

This cannot be denied. For that matter the Constitution does not refer to agriculture. Does that mean that the Congress may not provide price supports for cotton, soy beans or wheat? Obviously not. Nor does the Constitution refer to an air force, flood control, grants-in-aid, social security, kidnapping victims across state lines, and countless other matters which are the subject of consideration by the Congress. As Judge Learned Hand once wrote: "Constitutions can only map out the terrain roughly, inevitably leaving much to be filled in."

The Constitution was made for an undefined and expanding future. To be effective, it could not be fixed or static in its construction. It had to speak in generalities like "due process", and the "equal protection of the laws", if it were to be flexible enough to cope with social changes and the demands of a modern society. And precisely because of this characteristic, the courts have been able to extend the domain of law to the irrefutable facts of life during all the years of this country's great history. As if it had a built-in gyroscope or other self-righting mechanism, the Court adjusts, qualifies, extends and overrules judicial precedents, and in doing so, tends to stabilize and reconcile the counteracting social, economic and other forces that erupt in each new era.

In my opinion this decision will stand the test of time. In a great many communities, where racial segregation in public schools had been the accepted custom for many years the people have already responded as typical Americans and are following the Court's decision. How heartening it is to see responsible officials in these communities headed towards making their public school systems comply with the law of the land. The federal district courts have also carried out their responsibilities by making short shrift of those sporadic and ill-conceived efforts to evade the decision of the Court.

If there is any lesson to be learned from the Court's history, it is simply this: It does not have one rule for the North and a different rule for the South, East or West. Its scales of justice are not set one way for the rich or exalted, and another way for the poor or humble. Its judgment book is not kept one way for labor and another for management; one way for the Federal Government and another for the states. It is free from favor to any section, any interest, any person. All are equal before the law—none above it. As Chief Justice Hughes has said: "The officer of government, the State itself, is subject to the fundamental law that the humblest may invoke."

The judicial branch is not above criticism, any more than the executive or legislative branches. It has its imperfections like every other institution. It not only tolerates but thrives on its own dissents. As human beings, judges may err like any other persons. All we may expect of them is that they strive to perform their functions as best they can in the advancement of justice. It is wholesome and in the public interest to have free criticism of any official, institution or agency in government. But the criticism should be fair, responsible and informed if it is to be respected. It should not be an invitation to defy the rulings of the Court. For anyone who tears the Court down does as much harm as tearing down the Congress, the executive branch and for that matter, all government as well. Any attempt to wantonly discredit the Court is a disservice to freedom itself.

Those who appreciate the precious value of law and order and of security for the individual in his rights—not for a day but for all time, for their children and children's children—must know that it can only be gained and preserved by a Court removed as far as possible from the passion of the moment, from politics, from partisanship, from prejudice, from personal or sectional interest of any kind whatever.

And, in the Supreme Court, one finds just such an impartial tribunal insofar as it is possible.

Our liberties in the days ahead will depend largely on the esteem and attachment with which the Court is held by the people—upon the spirit of moderation with which its decisions are accepted by them. Public confidence in the soundness of the Court's decisions and in its integrity is the foundation of authority. In turn, the common fate of the people, their common aspirations in the dignity and rights of the individual, hinge on whether the Court shall continue to be the country's symbol of orderly, stable and just government.

As attorneys and officers of the Court, we have an important stake in the independence of the Court and a greater duty to it. The Court relies on us for assistance. We must give it our support by our own example. We must do everything possible to preserve its reputation. We can stir fuller recognition of the Court's distinguished role in our government, in our history, and in our development as a leader among nations.

The independence of the Supreme Court will be secure only so long as it is sustained by the confidence of the public and the Bar. And so long as the Supreme Court is independent, the people can be assured of equal justice under law. These are the mighty interacting forces by which we may strengthen in the hearts of all, pride, honor and reverence for the Constitution of the United States—the most treasured legacy that good fortune ever bestowed upon a free people.

Common Sense in Advocacy:

Some General Observations on Trial of a Suit

by John A. Wilson · *of the New York Bar (New York City)*

The trial of a lawsuit is an art, not a science, and no one will ever write a definitive set of rules on the "correct" way to try a case. As with any other kind of art, however, there are techniques in the trial of a lawsuit that can be learned from men experienced in the art. Mr. Wilson describes some of these techniques in this article.

"Advocacy" is a rather highfalutin word, more in use in Britain than here, and it tends to suggest the performances of those scintillating geniuses who were wont to destroy the opposing party utterly with one, and at the very outside two, devastating questions.

Very little in my own more prosaic experience would furnish any basis for a discourse along those lines. So for my purposes, I shall hopefully try to bring advocacy down to earth by common sense. And it is my thought to interpret advocacy broadly enough to cover certain aspects of preparation before trial as well as various aspects of actual trial.

However, lest I seem somewhat to belittle or apologize for mere common sense let me remind you of some rather notable things that have been said about it. An old Persian proverb, for example, estimates that: "One pound of learning requires ten pounds of common sense to apply it."

Also, someone, with undoubted insight, has said of common sense: "Common sense is, of all kinds, the most uncommon. It implies good judgment, sound discretion and true and practical wisdom applied to common life."

And the perspicacious Henry Ward Beecher praised common sense even more strongly when he said: "If a man can have only one kind of sense, let him have common sense. If he has that and uncommon sense too, he is not far from genius."

A Good Trial Lawyer . . . *Fundamental Qualifications*

Much has been written and said about the qualifications of the ideal trial lawyer. I doubt, however, if anyone has ever possessed all of them in high degree. Foremost among the generally recognized qualifications might be listed as fundamental: a keen insight into human nature; a good memory; facility with language; capacity for quick and sound decision; and a sense of proportion.

To this obviously incomplete list, I should certainly add a somewhat unglamorous quality, not often sufficiently recognized—just plain physical and emotional stamina. This is the quality which enables the trial lawyer to "take it", day after day, when the trial is long and the going rough—enables him—in the pungent language of fistiana—to "roll with the punches," without "taking a nose dive", and without "sniffing the resin".

Sometimes it is said in rather picturesque language that a good trial lawyer should also possess unusual sensitivity—as it were, "intellectual and emotional antennae". There is much truth in this, and indeed, it should be most gratifying to every aspiring trial lawyer to know that the crustacea and the insecta need not have sole monopoly of these antennae—these useful "implements of decision". But a well-equipped trial lawyer must also have the courage of his convictions, a capacity for bold and forthright action when seasoned judgment calls for it. Hypercaution, timidity of approach and vacillation rarely convince anyone. As a current musical hit puts it: "You've got to have heart."

Preparation for Trial . . . *A Prompt Beginning*

Preparation for trial, both on the facts and on the law, should begin promptly. Don't delay until the trial is almost at hand. A false start, based on an inadequate grasp of the facts and law, may require radical changes in pleadings or in bills of

particulars. Such changes may then be effectively used by your adversary to discredit your case at the trial.

If your client is to be examined before trial, an early comprehension of all the facts is essential; it is also essential if you are to conduct a timely and really effective examination of the opposing party. Prompt preparation, furthermore, may disclose significant weaknesses in your case and may possibly indicate the advantages of a speedy settlement, before mounting litigation expenses make any settlement more difficult or impossible.

Get the Facts

The most important aspect of preparation is to get the facts—all of them. As an eminent trial lawyer, former United States Attorney, Emory R. Buckner, used to say, in substance, to the young men about him:

> Have a passion for the facts. But remember this also. There is no democracy of facts. They were not all created equal. There are master facts and there are subordinate facts. So give to every fact its proper weight and influence, its just due.

Judge Chase of the United States Court of Appeals in *Coughlin* v. *The Commissioner*,[1] expressed a similar thought in this way:

> . . . as is so often true of legal problems [he said], the correct result depends upon how to give the facts the right order of importance.

Further—and here is a rather cheering thought—if you get all the facts you will find that many seemingly close questions of law will evaporate and disappear. Thus, thorough preparation on the facts may pay off well with a bonus on the law.

In dealing with your client and with your witnesses, you will need to be an apt student of human nature—always a practical psychologist, and sometimes a bit of psychiatrist, as well. Be sensibly skeptical about the stories they tell you. This does not mean, at all, that you must assume that your client or his witnesses are fabricating facts. It does mean that you should always remember that personal interest tends to bias one's point of view. So be sympathetic but objective, and I need scarcely say be diplomatic too.

Do not assume, as some clients do, that everyone who sues them is necessarily a highjacker or an unscrupulous scoundrel. Sometimes, indeed, there seems to be an inordinate predisposition on the part of some defendants to approach their cases with only one separate and very distinct defense in mind—one which may be labelled somewhat facetiously: "They can't do that to us." But unfortunately *they* sometimes can, and *they* sometimes do.

Many lawyers before they have really thoroughly investigated the facts unwisely display to their clients a premature and undue optimism about the successful outcome of the case. This is unwarranted. Adequate suspension of judgment is necessary.

Point out the weakness as well as the strength of your client's case. This should certainly tend to insure his more effective co-operation. If he has become optimistic, without warrant, however, you may find it difficult to convince him that he should accept a really good settlement. He may be unreasonable and obstinate, and may finally refuse such settlement—to his subsequent regret—and to yours.

Order of Witnesses

Give careful thought to the arrangement and order of witnesses. Your case must be planned, produced and presented much like a play with proper regard for dramatic values. Therefore, avoid tediousness, produce as much variety as possible, sustain suspense and by proper planning provide, in advance, for periodic climaxes at the trial.

Try, if possible, to end each trial session and each day on a high and confident note like a good aria. If you are able to do that, then, in a trial as in an aria, some unavoidably faltering notes along the way may not count quite so heavily against you.

The Mechanics of Trial . . . *Plan Them with Care*

The mechanics of trial should be carefully planned—and smoothly executed. Lost or misplaced papers, insufficient copies of important documents, disorganized files and similar mechanical disorders can and should be avoided. They slow up the pace of trial and destroy that timing and precision so essential to effective presentation.

And worse still! They upset the composure, poise and confidence of the trial lawyer. His resources of mind and emotion which should be held in readiness for unpredictable emergencies are, in fact, devoted to matters of mechanics. These could, with a little imagination and industry, have been taken care of before trial.

Often an otherwise good examination is spoiled completely because the examiner has had to waste time in a feverish hunt for papers. Confusion of counsel is the inevitable corollary of confusion of papers.

So achieve as near perfection as possible in these mechanical matters. For you will need all your wits and all your art and artistry to handle the unexpected situations which will surely arise. Prepare well and you may find that you will enjoy the trial because there is no undue strain.

Read Effectively

Recently educators have been anxiously asking in the language of a best seller: "Why Johnny Can't Read". A somewhat related and similarly provocative inquiry might be, why can't more trial lawyers read well to a court and jury? The reading of far too many of us is inaudible, hurried, unexpressive and monotonous. Often we expend much skill and many hours getting an important exhibit into evidence, and then squander its probative value by the simple device of reading it badly.

I recall a friendly court reporter in the Southern District of New York,

1. 203 F. 2d 307, 308. (2d Cir. 1953).

commenting to me, pointedly, upon this matter of ineffective reading, many years ago:

"Did you hear Assistant X read that beautifully fraudulent gold mining prospectus?" he asked, one morning during a mail fraud prosecution. "Terrible," he said rather disgustedly, "you could scarcely hear him; he raced through it; it sounded duller than a trust indenture. Don't ever do that."

An Illustrative Mechanical Failure

If your case is of sufficient importance and expense is not a deterrent, secure four copies or photostats of each important document on which you propose to cross examine a witness. This will greatly simplify and improve your presentation. For you will then be able to hand the judge a copy, the witness a copy, your adversary a copy and you may examine from a copy which you hold in your own hand. In this way you may sometimes prevent a most awkward and embarrassing situation. Let me illustrate.

We have all observed, I am sure, trial counsel attempting to cross examine a witness upon the contents of a document of which he has only one copy. He desires to call the attention of the witness to numerous passages in the document. Advancing confidently to the witness stand he leans nonchalantly over the witness, as he sits in his chair, to indicate those passages, asking a series of questions in a low confidential tone.

At this point, his troublesome adversary loudly announces that he not only has no copy of the document but that he cannot hear the questions. The court then admonishes examining counsel to speak up. But when examining counsel begins to question the witness in a strong loud voice, his adversary, a rather pestiferous fellow, I am afraid, next asserts that he is shouting at the witness and clearly endeavoring to intimidate him. He requests the court to direct the examiner to stand back from the witness.

Whereupon the court suggests that examining counsel take his position at the end of the jury box. The poor fellow does so, and again, feebly, and with obviously drooping spirits, attempts to recommence his questioning upon the exhibit.

Now, however, the witness gets into the act and says he simply cannot remember a thing the document contains unless he can look at it. So all the dejected examiner can possibly do is what, unfortunately he has had to do many times before, "crave the indulgence of the court" and pass on to other subject matter.

This and many similar awkward situations arising out of lack of imaginative preparation in mechanical matters, a little foresight could easily prevent.

Opening Statement . . . *A First Impression*

Your opening to a court or jury is of special importance for this is your first opportunity to give them a favorable impression of your case and of you. Like all first impressions it will be rather hard to eradicate. So plan your opening carefully.

Counsel should outline the issues and the evidence very briefly when his case is short and uncomplicated. The court and jury are deprived of the acute satisfaction of suspense and of discovery for themselves if counsel details the evidence overmuch. Christmas gifts are always more appreciated if they are not opened before Christmas Day and if the recipient opens the package himself.

If in the opening statement too much of the evidence is disclosed by counsel, then when it comes from the witnesses it may seem dull and routine—inevitable, like a moving picture seen for the second time.

However, in a case which is long and involved, the issues and a full outline of the evidence should be stated—sufficiently to enable the court and jury to understand and appreciate your proof—but not so fully as to destroy the vital elements of discovery and dramatic surprise.

Do not overstate your case. State only those facts which you are sure you can prove. Promise no more. Understatement is, in itself, a powerful factor in the psychology of persuasion.

Fabian Bachrach

John A. Wilson is trial counsel and a member of a New York City law firm. He received his B.A. from Brown University in 1923 and studied law at Oxford University, England, as a Rhodes Scholar, receiving a B.A. in Jurisprudence, a B.C.L. and an M.A. As an Assistant U. S. Attorney for the Southern District of New York, he prosecuted criminal cases from 1929 to 1932 before becoming associated as trial counsel with his present firm, where he is engaged in civil litigation.

Moderation in All Things . . . *An Essential Aspect*

Moderation in every aspect of the trial is essential. Remember that, as I have said, the lawyer who prepares and tries a case is in a sense producing a play—a play which may need to be revised in part every night after court—and in which he must always subordinate a natural desire to feature himself in the star role. The need to restrain an inordinate impulse to star holds true not only of the opening statement, but of the examination of witnesses on direct and, to some extent, also, on cross.

By the Great Apostle we are adjured, in Holy Writ, to let our "moderation be known unto all men". However, if you and I cannot achieve that ideal at least we can be sure to let our moderation

be known to every judge and jury before whom we try a case—and to the appellate tribunals as well.

Don't claim too much; don't exaggerate; be fair and reasonable; don't treat every issue as though it were framed in black and white; and recognize that truth often shades off into tones of gray. Exorbitant claims and denunciations, as some of the speeches during the recent political campaign well illustrated, have a singularly unpersuasive power.

Technical Objections . . . *Keep Them to a Minimum*

Now what about making objections at a trial? For practical psychological reasons experienced trial lawyers keep technical objections to a minimum even though the objections are technically correct. Numerous objections tend inevitably to suggest apprehensiveness of a full disclosure of the facts. When counsel objects again and again on the ground that testimony is incompetent, irrelevant and immaterial, the jury, and perhaps the court too, may soon conclude that his real objection is that proof is available to his adversary so competent, so relevant and so material as to jeopardize the objectant's case.

If your adversary's proof is irrelevant and so immaterial why bother to object? It will actually help your case if your opponent insists on following the paths of futility. So—in the words of a song, popular a few years ago: Make it your trial policy in this matter of objections as in other matters, "to accentuate the positive, eliminate the negative, latch on to the affirmative, and don't mess with Mr. In-Between."

However, if a question is really improper and prejudicial, make an objection. But make your objection specific and short. I well recall the advice which a genial and helpful federal judge of the Southern District gave me after the trial of my first case, a narcotics prosecution. Calling me to the bench he said:

> You tried your case very well, but let me make a suggestion about objections. Don't make purely technical objections. In fact, don't make many of any kind.
>
> But, if a question is really improper and harmful, don't hesitate to object. However, when you feel *an objection coming on* first take a look at the judge. Since he is supposed to know evidence too, you may well see that *sustaining light* come into his eye.
>
> Then your objection will probably be upheld and you will be thought a brilliant young lawyer.

Cross Examination . . . *A Dangerous Mine Field*

Cross examination is always potentially dangerous—a mine field full of booby traps. But quick and dependable insights and decisions become more possible if we have absorbed and assimilated all the facts and have exercised, in advance, an aggressive imagination as to the probable answers of the witness and the probable course his testimony will take.

If you perceive no real or apparent points of vulnerability in the testimony of a witness, do not magnify the importance of his testimony by attempting an extensive and vigorous cross examination. He'll really be good the second time around—and the jury will, if anything, be more impressed. Rather—be casual! Invite him courteously to step down. It is an art to know what to ignore and how to ignore it. You do not need to score a knockout in every round.

The best cross examination is frequently wholly unspectacular. The witnesses are not "destroyed" as some professional writers on advocacy like to put it. The type of examination I have in mind consists of building up the facts of the examiner's own case on the examination of his adversary's witnesses.

This method of cross examination has a steadily corrosive effect upon the case of the opposition; the opposition's case may be so progressively impaired as never really to stand up, impressively, at all. Moreover, the impact of one's own case is heightened if it can be established in large part out of the mouths of opposition witnesses.

Speaking of cross examination and of the common admonition "never, never, never to ask a question when you do not know what the answer will be," Judge Schientag said:

> It is rarely safe to use the words "always" and "never" in dealing with that unpredictable and strangely elusive phenomenon—human nature. It is helpful to know the general principles or rules, but as with salmon fishing so too with cross examination, it may sometimes be advisable, even necessary, to throw the rules overboard in order to land your fish.

With this piscatorial analogy of Mr. Justice Shientag I thoroughly agree. To shift from the piscatorial to the athletic, however: Who has not seen a football team, about to go down to defeat, turn defeat into victory because in the very last minutes of play an audacious quarterback had the quick good judgment and nerve to throw a long forward pass?

So it is with the seasoned cross examiner. Whether or not to chance the question is determined, in part, by the sensitivity of what Emory R. Buckner once called the lawyer's "intellectual and emotional antennae". But make no mistake about it! What often passes for a flash of genius or for mere good luck is more often the result of that insight, gained from a thorough knowledge of the facts and law, which enables the examiner, dependably, to forecast the probable answers of the witness.

Direct Examination . . . *The Neglected Twin*

Direct examination is the much underrated and neglected twin brother of cross examination. Some too readily assume that anyone can conduct a direct examination well, and too little thought is given to it. Yet I venture to say that more cases are won by good direct examination, coupled with effective summation, than by the more pyrotechnical displays of cross examination.

Pedestrian though it may seem, the best direct examination follows a simple formula and elicits "the when", "the where", and "the what" of proof, in orderly time sequence. Direct examination, however, need not be colorless and drab. To be

sure, the trial lawyer will need to restrain that impulse to star which is the father of so many leading questions. And he must be content to be the modest instrument for focusing attention and interest upon his witnesses. After all, basically, direct examination should be "the witness' show".

Nevertheless, the examiner must radiate the same interest and confidence in the testimony of his witnesses that he hopes the witnesses are creating in the minds of the judge and jury. This, more often than not, perhaps, will be a sufficient challenge to his artistic impulses.

Do not be deceived! Good direct examination is an art whose chief attributes are the quiet attributes of order, modulation and restraint—but it is an art, nevertheless, and by no means an easy one.

The Art of Summation . . . *It May Be Decisive*

The summation is your opportunity to draw the evidence together and to interpret it so that the court and jury may see it "steadily and see it whole". When the evidence on both sides of your case is pretty much in balance, the summation will frequently prove to be decisive of defeat or victory.

The nature, complexity and difficulty of your case must determine the length of your summation. Do not, as some do, make a fetish of brevity on the one hand or on the other let your enthusiasm lead you into undue length of presentation. Within the time for summation allowed by the court take only such time as you really need to make your arguments persuasively—always keeping an observant eye upon the court and jury to see that they remain alert and interested.

Don't tell the court or jury, in effect, what they must think or do—as though you were omniscient. Rather take the attitude of counselling with them in their analysis and in their search for sound conclusions. Again, moderation is the watchword.

Before trial, if possible, prepare an outline of summation. It will be helpful and will save time when you are hard-pressed at the trial. But your outline will certainly need revision in the light of the actual evidence.

Never read your summation. Speech as nearly spontaneous as possible tends to produce an impression of earnestness and sincerity, and to equate communication by counsel with reception by the court and jury. It is essential to that electric circular response between speaker and audience, so necessary to sustained and intelligent interest.

The objective of summation is to persuade the judge and jury, ordinary men and women, to action in favor of your client. What you think and *feel* about your case must be conveyed to them in the form of the clearest and most direct human appeal.

And do not be overconcerned with the literary excellence of your summation. The absence of such excellence will be more than compensated by a heightened impression of sincerity. The zigs and zags, the hesitancies and even the occasional crudities of spontaneous speech should tend only to make it more persuasive.

Tone and Style of Summation

There are those who believe that there is no longer any place for rhetorical values in the more traditional sense. They go all out for the conversational method, the homespun and homey style of address. The high value of this should certainly not be underrated. But many trial lawyers of the relatively more recent vintages are so fearful of emotional and rhetorical values that they invariably sum up with dull pedestrian restraint.

I would not defend empty flowery language, and certainly not bombast or flamboyancy. They are never appropriate. But the language of imagery, expressive of emotion, instinct with dramatic power, still has its place and should be appropriately employed. It is, at present, in my view, too much neglected. The rhetorical pendulum has swung too far.

There is no easy formula for the ideal summation. Neither use language of unusual rhetorical quality for its own sake nor talk down to the jury in a patent effort to reach the level of their imagined commonplaceness. Talking down to a jury is as unwise as that bombastic oratory which is "full of sound and fury, signifying nothing". Be natural. Proceed with a sense of proportion.

Harris in his *Hints on Advocacy* illustrates what I have been saying. He points out that the oratorical flights of Burke or of Sheridan would be ludicrous in an ordinary accident case. And, he goes on to add, with a delightful touch of humor:

> The empire is not at stake in every trial; and a British pickpocket may be defended, at least up to conviction, without a severe onslaught on the British Constitution.

No one is more conscious than I, that I have been giving rather freely, much advice, on a very old and most difficult subject. And, therefore, let me conclude on a note of caution and admonition both to myself as well as to you: As a noted woman advocate, Portia, in *The Merchant of Venice*, put it:

> If to do were as easy as to know what were good to do, chapels had been churches and poor men's cottages princes' palaces.

Government Contracts:

Small Business and the Law

by F. Trowbridge vom Baur • *General Counsel for the Navy*

There is a general impression in some quarters, Mr. vom Baur writes, that the businessman with a Government contract has an easy life, his only problem being how to wait for those fat Government checks that fall so gracefully out of those beautiful franked envelopes. As many a small businessman has learned to his sorrow, there is much more to it than that. A small business which has had no experience with Government contracts faces a complex mass of legal problems, procedures and obstacles if it decides to contract with the Government. Mr. vom Baur outlines the hazards that businessmen face in that situation.

It is often said that the survival of our system of free enterprise depends upon the maintenance and effectiveness of small business concerns; and the protection and encouragement of small business are strongly supported by the executive branch of the Government, including the Department of Defense,[1] and also by the legislative branch.[2] From the standpoint of the Department of Defense, more use of small business enterprises as prime and subcontractors will give the nation more capacity, greater dispersion and an expanded industrial mobilization potential in the event of war. As a result, it is perhaps fair to say that in public esteem generally, virtually nothing is in greater favor today than small business. Indeed, this has now gone so far that it may perhaps be said that there is a general attitude, in many quarters at least, that the more Government contracts go to small business, the better.

But it is perhaps time that we gave this a second thought. Experience in the Department of Defense, at least, has indicated that a sweeping attitude favoring the award of contracts to small business, without some further analysis, is perhaps not fully realistic, and that often it has unwittingly led to disastrous results. The reason is that unless in the award of a contract to small business there is present what might be called *the educational factor,* awarding the contract may not be a good thing. Indeed, it may be a very bad thing; it may literally result in killing the contractor with kindness, and wasting the taxpayers' money.

Perhaps you all know the story of the two down-and-out individuals who met on a park bench in Washington:

First Down-and-outer: "What are

The views expressed in this article are not necessarily those of the Navy.

1. Like other departments of the executive branch, the Department of Defense is subject to the national policy that a "fair proportion" of total Government procurement be placed with small business concerns (10 U.S.C. 2301 and 15 U.S.C. 640). The Department of Defense applies this to any concern, whether as a prime contractor, subcontractor or separate supplier, which is not dominant in its field of operations and, with its affiliates, employs fewer than 500 employees. Thus, it seeks to give small business concerns an "equitable opportunity to compete" for prime contracts, and it actively fosters subcontracting and subpurchasing from small business concerns. To implement this policy, a Small Business Adviser to the Assistant Secretary of Defense (Supply and Logistics) has been appointed, and in each military department there is a similar Small Business Adviser who heads an Office of Small Business for the department, composed of small business specialists (seventy-four in the Navy, for example) who are assigned to major purchasing activities. They are responsible for explaining the basic ground rules of Government purchasing to small business concerns, for seeing that bids and proposals are solicited from them, that procurement methods, procedures, and bid quantities are such as to encourage participation by small business concerns, and that active search is made for potential small business suppliers. The small business specialists of the military departments work closely with representatives of the Small Business Administration, an independent executive agency established under 15 U.S.C. 631-651. The Small Business Administration, in addition to a financial assistance program, has the statutory mandate to "consult and co-operate" with government procurement agencies (15 U.S.C. 640). Accordingly, its representatives secure listing of small business concerns for the Department of Defense, screen and make recommendations regarding procurements, and participate in a joint Small Business Administration—Department of Defense program to set aside certain procurements for award to small business concerns. In addition, prime contractors are required by a standard contract clause to subcontract to small business concerns the maximum amount consistent with efficient performance. And where a prime contract exceeds $1,000,000, the contractor ordinarily is urged to establish a Defense Subcontracting Small Business Program designed to assure small business concerns an equitable opportunity to compete for defense subcontracts.

2. A Senate Select Committee on Small Business has six Subcommittees, and a staff of some eighteen employees. The House Select Committee on Small Business has five Subcommittees, and a staff of some twenty employees. These Committees actively investigate hundreds of individual cases and closely scrutinize the administration of programs by the executive agencies on behalf of small business. See, *e.g.*, the following annual reports: Senate Report No. 1368, 84th Cong.; House Report No. 2683, 83d Cong.

you doing here?"

Second Down-and-outer: "Oh, I've been doing business with the Government."

First Down-and-outer: "Well I was once a low bidder on a Government contract myself."

I. *The Educational Factor*

A. *In General:* By the educational factor is simply meant that a contractor should have a clear knowledge and understanding of the legal obligations and procedure which he assumes in undertaking a Government bid or contract. For if he does not understand these things before he undertakes these obligations, he will undoubtedly find that learning them later is very expensive. He may find that he has undertaken obligations which he cannot, in practical terms, perform, and financial strain or even insolvency may be the inevitable result; or he may find that he is ineligible to be awarded a Government contract due to his failure to comply with the legal technicalities in executing his bid. And from the standpoint of the Government, the educational factor is vital: when absent, the performance of the contract usually results in misunderstandings, friction and argument, complex litigation in the Armed Services Board of Contract Appeals, waste of the taxpayers' money and serious delay in the furnishing of essential supplies or services for national defense. In short, it is essential from the standpoint of both the contractor and the Government that this educational factor be present as the master key to smooth performance of Government contracts.

Yet at the present time public emphasis appears to be the other way. Instead of being on this educational factor as the vital key to success in dealing with the Government, emphasis appears to be on the very absence of it. Indeed, there appears to be a definite impression in many quarters outside the Government that getting a Government contract is all to the good and presents no problems. This impression is held, not by the larger corporations whose gimlet-eyed, experienced legal staffs are constantly watching their Government contracts, but by those contractors who have had little or no experience with Government work —usually small business. Those without experience in Government work often seem to have the impression that once you get a contract with the Government the money rolls in. Many a would-be contractor with the Government is apt to have in his mind a glowing picture of fat Government checks falling frequently and gracefully out of those beautiful franked envelopes—and no picture at all of the complex legal problems, procedures and obstacles with which he may suddenly be faced, once a contract is obtained.

But the need for the educational factor is always there; and it is vital in two main areas, (1) the area of bidding for or obtaining Government contracts, and (2) the area of performing a contract which has been awarded.

B. *In Obtaining a Government Contract:* If there is a fundamental legal theory which must be clearly understood in connection with Government contract work, it is the drastic theory which underlies the difference between acting for a private concern or corporation and acting for the Government. The general approach of an executive or lawyer of a private corporation is simply this: What things can I do without running afoul of some legal restriction? On the other hand, the Government administrator has a very different problem. His basic concern is: Under what legal authority can I proceed? Congress has enacted a large amount of restrictive and channelizing legislation, complex in character, implemented by administrative regulations and provisions, which have set up an intricate structure and which must be complied with strictly in order for anyone to act for or to bind the Government. As a result, a person bidding on a contract must comply strictly with all the applicable laws and provisions, including those provisions set forth on bid forms themselves. For instance, everyone should know that, in formally advertised procurements, a bid must be responsive to the invitation for bids, and that unresponsive bids will be rejected. But there are many business concerns which simply do not appear to know this much. They seem to treat the whole business very casually. As a result, a large number of bids come continually into the Government which are simply not responsive to the invitations and which are rejected as unresponsive, with resulting economic waste, not only to the Government, but also to the business concerns which expended the time and money necessary for preparing these complex documents. This economic waste is caused simply by an absence of the educational factor. Also, the rejection of low bids which take exception to the essential requirements of the invitation for bids leads many business concerns, uninformed of the rules of Government procurement, to feel that the Government has been arbitrary or discriminatory in awarding the contract to a higher bidder.

C. *In Performing a Government Contract:* In the field of contract performance, however, the results may be infinitely more serious. Unless it knows what it is getting into in advance, a business concern may find that it has a bear by the tail. That contract, the obtaining of which undoubtedly seemed a wonderful event, may suddenly seem to be transformed into a terrible instrument plunging the contractor headlong into disaster, when its requirements of performance are understood.

Indeed, the ignorance of some contractors as to what is expected from them in the course of performance of a Government contract is appalling. The need for education is enormous. Frequent complaints from some businessmen are that they thought that the Government would "guarantee" them against loss; or that in the event of trouble, the Government would "take care" of them. These people never knew what they were getting into when

they entered into the contract. It is true that the Government makes every effort to be fair and co-operative, but the existing provisions of law simply prohibit the Government from representing any interest except the public interest. It is up to the contractor to take care of himself.

II. *Obtaining a Government Contract*

A. *Stop, Look and Listen!* Now let us examine the average Government contract; for anyone planning to do business with the Government should have a pretty good idea of what is in it before he enters into one. Each of the clauses is there for a purpose. First, the average Government contract contains technical specifications, which in their turn are just as complex as the type of material or weapons that are intended to be procured, and these must be complied with strictly. Accordingly, no would-be Government contractor should endeavor to bid on a contract with the Government unless he has available the technical people, the industrial capacity and the know-how, and unless he is fully capable of producing strictly in accordance with the specifications within the delivery time specified.

Second, there are a large number of contractual provisions, which are usually called "boiler-plate" and which are based in part upon various statutory restrictions, prohibitions and standards laid down by Congress for the entering into of Government contracts. In general, these include statutory requirements affecting the assignment of claims, excessive contract profits (renegotiation), the purchase of foreign-made supplies, the employment of labor, contingent fees, the examination of records and gratuities. Again, these must be complied with strictly, for the existence of these provisions of law enacted by Congress simply leaves Government administrators and their counsel no alternative. Also the contract provisions define the rights and obligations of the parties with respect to such matters as contract changes, extras, variations in quantity, responsibility for supplies, payments, termination of the contract for default of the contractor and for the convenience of the Government, patents, warranties, and disputes. Again, the Government's contracting officer is charged with administering and protecting the Government's rights under these clauses and holding the contractor to his obligations.

Third, there are provisions for inspection by Inspectors of Naval Material and others, and any would-be contractor with the Government should realize, again, that when the Government enters into a contract for the production of a certain strictly specified item, that item will be subject to critical inspection to make sure that it fully meets the requirements set up in the specifications. Indeed, it should be recognized that human life as well as military effectiveness are involved when the Government orders weapons and military equipment, and they have to be exactly right. For the Government is responsible to the people for defense and the effective functioning of defense equipment, and it can take no chances; hence the requirement for inspection. Also, the Government is by law prohibited from paying the contract price unless and until the supplies or services conform to the technical requirements of the contract specifications.

Fourth, there are often certain fiscal and accounting procedures required by the contract, and again, no would-be contractor should try to enter into a contract with the Government unless he knows what the Government system will be and unless his accounting methods and manufacturing system can meet the Government's requirement.

B. *Note Specially the Provision for Change Orders:* The ordinary Government contract empowers the contracting officer to make unilateral changes in specifications within the scope of the contract, and this provision is essential to the whole process of Government procurement. Weapons design, and many other items of specifications are constantly changing within the kaleidoscopic technology of modern defense, and if our Government is to keep up with the shifting scientific concepts of warfare, changes within the scope of the contract must often be made in the very process of manufacture. To be sure, the contract provides that the Government will pay equitably for any increase in the cost of performance so changed, but the contractor very often does not realize that the very making of a change order by the contracting officer may present him, the contractor, with substantial collateral problems. For instance, it necessarily requires him to put up any additional working capital required in the interim before the change order is made final and an equitable adjustment for any increase in cost is paid. Second, although the contract so provides, sometimes a contractor does not realize that there should be a written change order, and if possible a written agreement on the cost of the equitable adjustment necessary to pay for it; and that the

F. Trowbridge vom Baur has been General Counsel of the Navy since 1953. A graduate of Amherst College and of the Harvard Law School, he has had considerable experience in the field of administrative law and is the author of a work on the subject. He practiced in Washington, D. C., before becoming General Counsel of the Navy.

services of a lawyer through the whole change order process may be very useful. In any event, whenever one enters into such a Government contract, he should certainly be prepared to meet the financial, legal and other problems which may be raised by possible change orders.

C. *Watch Out for Patent Indemnity:* Defense contracts for standard commercial supplies ordinarily obligate the contractor, subject to certain exceptions, to indemnify the Government against liability for patent infringement arising out of the performance of the contract.

D. *Know What To Expect With Regard to Contract Termination:* Before bidding on a Government defense contract one should know the circumstances under which the Government may cancel or terminate the contract, and what the consequences of such termination may be. Defense contracts ordinarily give the Government the power to terminate the contract either for its convenience or for the contractor's default. If the Government's need for the contract supplies or services diminishes, the contracting officer will ordinarily exercise his power to terminate the contract rather than let the Government take and pay for supplies it no longer needs. In consequence of such termination the contractor will be reimbursed for his costs of performance and will be paid a reasonable profit on work done. Anticipatory profit may not be recovered, and the recovery of costs and profits may not exceed the contract price of the terminated articles.

On the other hand, the contract termination may arise from the contractor's default—failure to furnish the supplies or services within the time specified, or failure to discharge any other obligation of the contract. The price of termination for default is liability for the Government's excess costs in repurchasing the terminated supplies or services, as well as liability for any other damages proximately caused by the contractor's default. But liability for excess costs does not arise when the contractor's failure to perform arises out of causes beyond his control and without his fault or negligence. When the failure to perform is so caused, the termination, in the case of contracts with the military departments, should be treated as a termination for the Government's convenience.

E. *Understand the Machinery of the Disputes Clause:* Finally, we have the disputes clause, which gives the contracting officer the power to decide disputes over questions of fact with respect to claims arising *under* the contract, as distinguished from claims for *breach* of the contract which must go to the Court of Claims, or to a federal district court when the claim does not exceed $10,000. The contract also gives the contractor the right to appeal from the decision of the contracting officer to an administrative tribunal, the Armed Services Board of Contract Appeals, as the designee of the Secretaries of the military departments, in the case of contracts with a military department. On these appeals, the cases are heard *de novo*, being tried through the examination of witnesses and the proving of documents in a manner generally comparable to a trial in the courts vested with judicial power and in other administrative tribunals. However, under the contract the contractor is obligated to proceed with its performance pending final decision on the dispute and in accordance with the contracting officer's decision. Again, any would-be contractor seeking a Government contract should be prepared for the eventuality that he may not be able to reach an agreement with the contracting officer on such things as the amount of equitable adjustment on a change order, and on many other questions in dispute in connection with these claims under the contract. If he does not understand this and is not prepared to finance these appeals as he would litigation elsewhere, he may find himself in serious trouble.

III. *The Role of the Lawyer*

A. *The Need for Representation of Contractors by Lawyers:* Finally, it is at least noteworthy that one cannot expect any segment of business to become educated properly on these legal aspects of prospective Government contracts except through the legal profession. For this complex field of government contract law requires the services of lawyers as much as any comparable legal field.

This directly involves the factor of representation of contractors. First, Government officials certainly cannot represent the interests of contractors, although, as indicated above, some contractors actually do think that the Government will "take care" of them or is otherwise in a paternalistic capacity. Second, I think that in the past many business people have thought that getting a Government contract was such a simple matter that hiring a lawyer was not necessary. Indeed, the role of law and the role of the lawyer in dealing with the Government have never been adequately understood. The businessman does not always realize that the Government negotiator across the table from him has a lawyer sitting at his elbow; and, similarly, that the Government contract administrator watching its performance usually also has a lawyer at his side. In my opinion, it is essential for the contractor to have legal advice in connection with both the entering into and the carrying out of Government contracts. And it is to the Government's interest as well as to that of the contractor to have him represented by counsel on legal matters, for such representation invariably leads to clearer understandings, a prevention of trouble, a better and more concise presentation of claims, and a minimizing of friction with the Government.

B. *Education of the Bar; the Need for a Better Dissemination of Written Material in a New Field:* It is perhaps not adequately recognized even among lawyers that there exists today this distinct body of law which is usually called government contract law, and that it is a relatively

(Continued on page 665)

Loyalty and National Security:

Commission on Government Security Reports

After eighteen months of study and appraisal of the whole national security system, the Commission on Government Security, under the chairmanship of former Association President Loyd Wright, of Los Angeles, issued its report last month. The most important features of the Commission's findings are covered in this article, written by a member of the Commission's staff.

Acknowledgement was recently made by the White House that the Commission on Government Security had submitted its report covering eighteen months of study and appraisal of our entire national security system. The report, which sets forth the Commission's findings and recommendations, separates the loyalty problem from those arising from suitability and security. It pointed out that whereas all loyalty cases necessarily involve security, the converse is not true. A man who talks too freely when in his cups and a sex pervert who is vulnerable to blackmail are both security risks although neither may be basically disloyal. The Commission urges that such cases be considered on a basis of suitability, whenever possible, to safeguard the individual from an unjust stigma of disloyalty.

The President, Vice President and Speaker of the House each appointed four members to the Commission and the twelve then elected as their Chairman Loyd Wright, a past President of the American Bar Association. The Commission's staff was divided into investigative, legal and research sections. The scope of activity, which covered all aspects of the loyalty-security problem, included misuses of passports and visas; port security; the loyalty of both civilian and Armed Services employees; industrial security; the security programs of the Atomic Energy Commission, the Civil Service Commission, the Immigration and Naturalization Service, and defense plants. The Commission studied the loyalty programs of such international organizations as the United Nations and UNESCO, proposed a program for air transport and also covered all the other governmental agencies where loyalty and security matters are pertinent. In considering these matters the Commission also studied the right of federal employees to be confronted by those who charge them with disloyalty. It recommended that confrontation and close examination be extended to persons subject to the loyalty investigations whenever it could be done without endangering the national security, pointing out that "it is the prime duty of government to preserve itself, and in the carrying out of this duty it has the indisputable obligation to avail itself of all information obtainable, including information from confidential sources. Full confrontation, therefore, would be obviously impossible without exposing the government's counterintelligence operations and personnel with resulting paralysis of the government's efforts to protect the national security."

The Commission also recommended that the basic programs affecting federal civilian and military personnel, industrial security, port security, employees of international organizations, the classification of documents, passport regulations, and the control of aliens be retained with fundamental revisions which the report sets forth in detail. In addition, an entire new program was proposed for the purpose of safeguarding national security in the vital operation of our civil air transport system.

Throughout the report, emphasis was placed on the necessity of adequately protecting the security of the nation, and substantially increasing the protection to the individual government employee who may find himself involved in a loyalty or security matter.

In an effort to secure uniformity of administration and simplicity of the security system as a whole, the Commission proposed the establishment of an independent Central Security Office in the Executive Branch of the Government. It declared that one of the principal causes for the breakdown of past loyalty and security programs was a critical shortage of trained, qualified personnel to administer them. Hence, the first duty of the Director of the proposed Central Security Office would be to select eminently qualified personnel, provide them

with an initial period of training, and to follow it by additional in-service training as required. A Central Review Board would review cases if appealed from the adverse decisions by the heads of the various governmental agencies, but decisions of both the hearing examiners and the Central Review Board would be only advisory to the agency heads. This Central Security Office would assist the various federal agencies through consultations and conferences, in training and on screening and other security duties. The various loyalty and security programs of the Government could thus be reviewed and inspected to ensure uniformity of rules, regulations and procedures, and the office would also receive complaints from industry relating to various industrial security programs, in order that inconsistencies and duplications can be corrected and a simple, uniform administration of the security program achieved.

For several years the Attorney General of the United States has, from time to time, issued a list of organizations characterized as subversive. The Commission recommends that this list be continued as an essential part of the federal loyalty and security programs serving, as it does, to guide the various agency heads in correctly evaluating the affiliations of its personnel. The Commission recommends a statutory basis for this list and also that future listings be authorized only after an FBI investigation and an opportunity for the organization to be heard and present its case before examiners of the Central Security Office, with the right of appeal to the Central Review Board. Decisions of the examiners and the Board, as in other cases, would be advisory to the Attorney General.

In discussing the conferring of subpoena power, the Commission pointed out that neither the Government nor any individual involved in loyalty or security cases in the past could compel the attendance of witnesses at hearings. The report recommends that hearing examiners have the power of subpoena with wide latitude to prevent excessive cost, unnecessary delays and obstructive tactics. Witnesses would be allowed travel and per diem expenses, and the Government would pay its witnesses' costs and those of persons cleared by the hearings. The program recommended for civilian government employees entails a loyalty program applicable to all positions and a suitability program within the framework of Civil Service regulations. In the executive branch, the Commission would exclude the CIA and the National Security Agency from this program. The report further recommends changes in existing Civil Service regulations to permit the transfer of "loyalty, security risks" to non-sensitive positions, or their dismissal under normal Civil Service procedures. The Commission recommends equal treatment on loyalty and suitability grounds for veterans and non-veterans in the federal employ, and strongly urges that all departments of the Government be treated alike; hence, recommending that the legislative and judicial branches also develop loyalty and security programs.

In connection with the Armed Services, which include the Coast Guard, the report recommends that the standards and criteria for separation, for denial of enlistment, induction, appointment or recall to active duty be predicated on the basis of denial when all available information has been considered and there exists a reasonable doubt as to the loyalty of the individual. Inductees rejected for security reasons at present have an opportunity for a hearing and this the Commission would extend to enlistees who are rejected for loyalty reasons, if they so desire. The cost of such a hearing would be borne by the Government and military counsel would be assigned. Recommendations existing in the other programs providing for issuance of subpoenas and for confrontation would also be applicable to the military personnel program.

In discussing the classification of documents, now labeled "confidential", "secret" or "top secret", the Commission recommends that the classification of "confidential" be discontinued. Since the recommendation would not be retroactive, it would eliminate the immediate task of declassifying material in that category, and the Commission further recommends abolition of the requirement for a personnel security check before permitting access under the defense contracts now classified as "confidential". The report stresses the danger to the national security that arises out of over-classifying information that would retard scientific and technical progress, thus depriving the country of the lead time that results from the free exchange of ideas and information in these fields, but also emphasizes the necessity of classification for the purpose of preventing highly critical data from falling into improper hands.

The Atomic Energy Commission is described as an employer of federal civilian workers and also as an operator of an industrial security program. Hence, the recommendations in the report were designed to bring both of these programs into conformity with the comprehensive programs planned for general application throughout the various departments and agencies of the Government.

In the field of industrial security, the Commission declares that there is a dire necessity for securing uniformity of regulations, procedures and administration and that this desired effect would be obtained through the Central Security Office. Thus, the benefit of a uniform program would be available and the heads of the various government agencies would be constantly advised concerning uniformity of regulations, the interchange and transfer of clearances from one agency to another would be effected, uniform forms for applicants for clearance would be adopted and trained hearing officers would be provided to preside over the hearing afforded to applicants for clearance whose clearance has

been denied or revoked.

To obtain uniformity within the Armed Services with respect to the Department of Defense industrial security program, the report recommends the establishment of a security office within the Office of the Secretary of Defense. This office would integrate, control and supervise the industrial security programs of the three services, thereby eliminating duplicate clearances, investigations, fingerprinting and repetitious execution of applicant clearances and related forms; it would accomplish a streamlined administrative pattern intended to eliminate the present delays that result from the use of chain-of-command communications regarding security matters. The downgrading and declassification programs would be monitored from this office as well as the disposition of classified material upon the completion of the contracts under which it originated.

The Commission's study of port security, the report declares, reveals serious defects in existing regulations and administration. It was, therefore, recommended that the Commandant of the Coast Guard be given full jurisdiction to administer the program, with the exception of designated Army and Navy installations which would continue to be administered by military authority. It was further recommended that clearances for port workers by the Coast Guard, Army and Navy be interchangeable.

The Commission declares that one of the problems that has arisen in the administration of the Coast Guard security program has been the failure to give applicants for clearance adequate notice of the reasons for denials thereof, and the report recommends that in the future applicants be given specific and detailed notice in that regard to the full extent that the interests of national security will permit.

A security program for civil air transport is recommended, but only those employees who are actually in a position to do substantial damage to the Government's security would be included in the proposed program.

The Commission recommends that the existing loyalty program for United States nationals employed by international organizations be continued, but that the standard be broadened to exclude also those who are security risks for reasons other than doubtful loyalty. The standard proposed by the report would be whether or not, based on all available information, there is reasonable doubt concerning the loyalty of the individual to the Government of the United States, or reasonable grounds for believing that the person might engage in subversive activities against the Government of the United States.

In the field of passport security, it is recommended that Congress enact legislation, defining the standards and criteria for a permanent passport security program, the procedures therein being defined by regulation. It was also recommended that the present criminal statutes be amended to make it unlawful for any citizen of the United States to travel in any country in which his passport is declared to be invalid, to make willful refusal to surrender a passport, lawfully revoked, a criminal offense. The report further recommends that the Legal Adviser of the State Department should determine the legal sufficiency of all passport denial cases before final action by the Secretary.

In discussing immigration and naturalization, the Commission recommended that the functions of the visa control, except for diplomatic and official visas, be transferred from the Department of State to the Department of Justice and that the Attorney General be authorized by law to maintain personnel abroad to carry out these functions.

The report declared that the admission to the United States of any large group of aliens *en masse* creates a serious security problem. It therefore recommended that the status of refugees admitted under any emergency condition not be changed until all have been adequately screened and that the Government sponsor an Americanization program for all refugees ultimately granted permanent status. In this connection it was urged that the parole provision of the Immigration and Nationality Act of 1952 be amended to clarify the intent of Congress in these matters.

The Commission further recommended that the deportation provisions of the Immigration and Nationality Act be amended to provide for the suspension of the issuance of all but diplomatic and official visas and of the use of bonded transit by the nationals of any country which refuses to accept a deportee who is a national, citizen or subject of such country; the detention at the discretion of the Attorney General of any alien against whom a final order of deportation is outstanding for more than six months, if required to protect national security or public safety; and authorization for the Attorney General to order a deportable alien to refrain from subversive activities or associations.

The report also urges that the provisions for fingerprinting and registration of aliens remain in force, and that an adequate training program be conducted for all persons engaged in the discharge of visa functions.

Two new substantive laws are recommended. The first would penalize unlawful disclosures of classified information with knowledge of their classified character by persons outside as well as those within the employment of the Government. In the past, only disclosures by government employees have been punishable. The second law would make evidence obtained by wire tapping by authorized government investigative agencies admissible in court; but wire tapping would be permissible only by specific authorization of the Attorney General and only in investigations of particular crimes affecting national security.

Denver Regional Meeting

One of Most Successful

The Association's first regional meeting of 1957, held in Denver, May 8 to 11, proved to be one of the most successful ever held. Actual registrations totalled 882 lawyers and judges, and total attendance including wives and guests exceeded 1,200. Eight states were included in the mountain and plains region but registrations came from thirty-three states.

Interest in the meeting was heightened by the fact that, for the first time, the annual Judicial Conference for the Tenth Circuit was held in conjunction with the American Bar Association sessions. Associate Justices William J. Brennan, Jr., and Charles E. Whittaker of the Supreme Court of the United States were among the many members of the federal judiciary participating in both meetings.

The sessions started with registrations the afternoon of May 8 at the headquarters hotel, the Cosmopolitan, and a reception was held that evening for early arrivals, sponsored by the Junior Bar Section. The reception was in the famed Brown Palace Hotel.

The business program began the following morning with an Assembly session at which President David F. Maxwell, in the principal address, outlined the American Bar Foundation's rapidly growing program of legal research in the public interest. He said the research program is one of the important ways in which the profession is discharging its public responsibilities. Referring to recently published articles in national magazines which implied the profession lacked civic responsibility, or which gave undue emphasis to the unethical fringe elements among lawyers, President Maxwell said: "It is unfortunate that the conduct of a few ethics busters in the profession attracts more public attention than the constructive work that the lawyers and judges of the country are carrying on, of which the program of the American Bar Foundation is an excellent example."

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Mr. Justice Whittaker, Mr. Justice Brennan, and President David F. Maxwell at the Denver airport for the Mountain and Plains Regional Meeting in May.

Also at the opening Assembly, an 89-year old Denver lawyer, Harry Clayton Davis, was honored as the senior American Bar Association member in the Rocky Mountain and plains region. He has been a member of the Association since 1901. A native of Medina, New York, and a graduate of Cornell University Law School with the class of 1889, Mr. Davis was admitted to the New York Bar the following year and has been practicing ever since. He came to Denver in 1890, and is a former President of the Denver Bar Association. The honor citation was read before the Assembly by retired United States Circuit Judge Orie L. Phillips.

At the Assembly luncheon on May 9, Associate Justice Brennan, the principal speaker, called for united and vigorous action by the profes-

sion to eliminate "inordinate delays" in litigation. He said New Jersey had demonstrated that through court reorganization, calendar control and the requirement of regular work reports by judges, calendar congestion problems could be overcome. He was introduced by Mr. Justice Whittaker. Presiding at the luncheon was Colorado's Chief Justice O. Otto Moore.

During the afternoon of May 9, and through the following two days, the program was given over to a series of panels and workshops which were universally hailed as among the most successful held at any regional meeting.

Sections and Committees sponsoring programs were: Mineral and Natural Resources Law Section, on hard rock mining and oil and gas matters; Unauthorized Practice Committee, on various aspects of that subject; Municipal Law Section, on legal problems involved in the rapid growth of municipalities; American Citizenship Committee, on current citizenship problems; Bar Activities Section, on law office management, minimum fees and disciplinary procedures; Lawyer Referral, Legal Aid, and Legal Assistance to Service Men, on the progress of these projects; Patent, Trademark and Copyright Law Section, on practical information for the general practitioner; Corporation, Banking, and Business Law Section, on financing for mineral development; Insurance, Negligence and Workmen's Compensation Law Section, jointly with the Junior Bar Section, on pretrial and other aspects of trial practice; Real Property, Probate and Trust Law Section, on estate planning, securities transfers and real property titles; Traffic Court Committee, on its expanded program of activities in the interest of improved traffic court standards.

The social phase of the meeting was outstanding too. The Denver Bar Association and the Colorado Bar Association were hosts at separate receptions on each of the two evenings of the business meeting. At the regional banquet the evening of May 10, President David F. Maxwell presided and informal remarks were made by Judge Alfred P. Murrah of the Court of Appeals for the Tenth Circuit. Talented members of the Denver Bar presented a folk opera, "A Critique of the Jealous Mistress". At the banquet a special presentation of a corsage was made to Mrs. Charles S. Rhyne of Washington, D. C., wife of the President-Nominee of the Association, who was reared in Denver and whose marriage to Mr. Rhyne took place there twenty-five years ago.

Denver lawyer Harry Clayton Davis was honored as the senior American Bar Association member in the Rocky Mountain region during the Denver Meeting. Mr. Davis (left) is shown with retired United States Circuit Judge Orie L. Phillips.

In addition to Justices Brennan and Whittaker, numerous other leaders of the Bar, judiciary and government took part in the three-day program. U. S. Judge Irving R. Kaufman, of the Southern District of New York, who was the presiding judge in the Rosenberg spy case, appealed for wider use of pretrial procedures as a means for cutting down court backlogs. Deputy Attorney General William P. Rogers, addressing a luncheon meeting, urged further efforts to minimize political considerations in judicial selection. He suggested that the major political parties endeavor to agree upon a formula to prevent "gross imbalance" in the future in federal judicial appointments.

Edward G. Knowles, of Denver, State Delegate from Colorado, and Thomas M. Burgess, of Colorado Springs, the latter a member of the American Bar Association Board of Governors, were co-chairmen of the regional meeting. It was arranged under the general supervision of the Association's Regional Meetings Committee headed by John D. Randall, of Cedar Rapids, Iowa. The Regional Meetings Committee of the Association met during the Denver sessions to plan future meetings, one of which may be held this fall for states in the Northeast. A Southern state regional meeting will be held starting next February 19 in Atlanta, Georgia, and an invitation was accepted to hold a Northwest regional meeting in Portland, Oregon, in the spring of 1960.

The Notre Dame Program:

Training Skilled Craftsmen and Leaders

by **Joseph O'Meara** • ***Dean of the Notre Dame Law School***

In this article, Dean O'Meara describes the current law curriculum of what is perhaps a typical smaller law school in the United States. The purpose of a law school, of course, is to train men to be efficient, competent members of the Bar, but Dean O'Meara indicates that his law school attempts to do more than that. The lawyer is one of the natural leaders of his community, and the program at Notre Dame undertakes to prepare him for that role also.

"There has been altogether too much copy work, too much patchwork, and too little original thinking in the formulation of objectives and programs in the law schools."[1] Those words by John G. Hervey, Adviser to the Section of Legal Education and Admissions to the Bar, are a challenge to the law schools of the country to take a long look at what they are doing and how they are doing it—and why. After just such a scrutiny, the Notre Dame Law School inaugurated a new instructional program in 1953. The main outlines of that program, now in full operation, are described in this paper.[2]

There are two points which are basic to our approach to legal education. In the first place, Notre Dame is and intends to remain a small school and our program of legal education is keyed to that fact.[3] Not all the advantages are on the side of being big. There are real advantages in being small. For one thing, it is possible in a small school to treat the individual student as an individual. But the advantages, the distinctive potentialities of smallness, must be recognized and cultivated; they are dissipated if one is preoccupied with imitating bigness.

The second point is our conception of legal education as a joint and co-operative undertaking. Our program reflects the thesis that, given things as they are in this harried and hurried present-day world, best results are achieved not by individual sorties but by a *concerted* attack upon the educational problem by the faculty working *as a team,* to the end that each course will play its assigned role in a *co-ordinated* pedagogical campaign. *This is of the essence.*

The Curriculum . . . *A Prescribed Program*

The business of a law school is to make lawyers—"great lawyers", as Mr. Justice Holmes insisted.[4] This we can do to best advantage, we believe, by discarding electives and offering, instead, a prescribed program of instruction; and we have done so, thus making it possible for every course to build on the foundation laid in courses already taken and, in turn, to lay a solid foundation for courses yet to be taken.

Our reasons for discarding electives have been summarized as follows:

> The elective system . . . proceeds on a fallacy, [and] in practice . . . involves many absurdities. I recall hearing . . . of a student who never took a course above the second floor. And there is not only a spatial, there is also a temporal principle of selection at work: students have told me they made it a point never to sign up for a course given before 9:30 in the morning. In other ways, as well, the elective system tends to coddle students; it encourages them to choose what are thought to be snap courses and instructors with a reputation for marking high.
>
> Moreover the elective system is at war with one of our obligations, namely, to train lawyers for responsible leadership. This means that our graduates must have a rounded and balanced legal education; and this, in turn, means that they must have training in areas which, left to their own devices, many would pass by. History and jurisprudence . . . are examples. Labor law is another. The

1. Hervey, *There's Still Room for Improvement,* 9 J. LEGAL EDUC. 149, 150 (1956).
2. What I have to say has no application to graduate study leading to the LL.M. or S.J.D.
3. The optimum enrollment, according to our hypothesis, is in the 250-300 range.
4. *The Use of Law Schools* in COLLECTED LEGAL PAPERS 35, 37 (1921).

rise of labor unions and the revolution in the law pertaining to them constitute one of the most significant social phenomena of our time and one with which a lawyer, both as lawyer and as leader, should have something more than a newspaper acquaintance. Yet many students enter the practice with only such knowledge of labor law as they have picked up from partisan debate about the Taft-Hartley Act.

More generally, and as a further example, there are the great fields of legislation and administrative law. Many students somehow get the idea that the only subjects of any real importance in the practice of law are those taught in the conventional common-law courses. I am at a loss to understand why anyone should think so. In any case, it is clear that a law school which aspires to turn out competent practitioners, who are at the same time equipped for responsible leadership, must cultivate an understanding on their part of the origin, growth, functions and procedures of these great institutions, the legislature and its offspring, the administrative agency. However nostalgic some of us at times become for the good old days, government would bog down hopelessly without administrative agencies. And it should be remembered always that a free and representative legislature is the hallmark of democracy. There were able and impartial courts in the days of Imperial Rome. But there has never been a free and representative legislature save in a democratic society.[5]

Many will think this overstates the case. I am persuaded that, on the whole, it does not. I must make it plain, though, that we do not necessarily exclude the possibility of fruitful use of electives on a limited scale in the final year of law study. We recognize an obligation to cultivate not only breadth of view but, equally, depth of understanding; and it may be that depth of understanding is facilitated by allowing the student some choice of courses in his final year. For us that remains an open question.

In any case, we reject the notion that specialization can be undertaken profitably before a student has obtained his LL.B. The customary three years of law school afford little enough time for the thorough grounding in the fundamentals of the major areas of law which *every* lawyer ought to have.

How best to provide this thorough grounding? That, in our view, is the critical question. Can it be said that *any* selection of courses taken in *any* order will do the job as well as any other? We think not. This seems to us to demonstrate the advisability of an *integrated* program of legal studies; and the formulation of such a program, obviously, can only be the responsibility of the faculty.

Like the law itself, our required curriculum is not a finished product. It is kept under constant surveillance to the end that no opportunity will be overlooked to make it mesh more perfectly with the responsibilities and opportunities of practice. No matter how well we succeed in that, however, we know that lasting success is impossible. For the law is alive and growing. As it grows and changes, corresponding changes in our curriculum will be called for. We will be alert to make them.

Methods of Instruction . . . *An Institutional Approach*

No less important than the "what" is the "how" of legal education, and Notre Dame has adopted an institutional approach to method as well as to content.

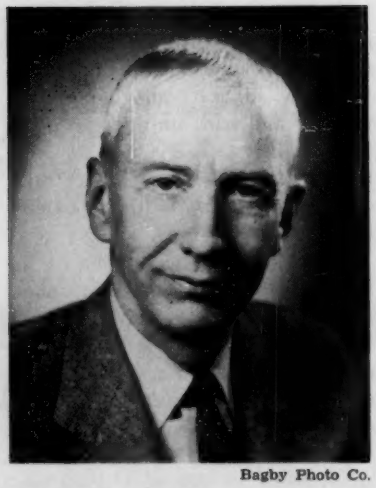
Our primary insistence is upon *maximizing student participation* in the educational process. The common law is not merely or essentially a body of knowledge. It is, rather, a way of approaching problems, a method of dealing with concrete situations, a technique; and it can be learned only by practice. A student can learn *about* law by reading books and attending lectures. But this is not enough if what he wants is to be a lawyer. For the practice of law is a craft. A lawyer can never have enough knowledge, but no amount of learning ever made a lawyer. In this sense a lawyer is like a surgeon, mastery of whose art entails much more than merely reading or hearing about operations. Similarly, it is indispensable for a lawyer to have the "feel" of the law, and this there is no way to acquire except by long practice in the actual use of legal materials. It cannot be done vicariously. The student has to learn to keep himself afloat—in good weather and bad; no one can do it for him; it is a disservice to try. And he will develop his capacities fully only if forced constantly to extend himself.

In the first year we emphasize intensive training in analysis through rigorous use of the case method. What do I mean by rigorous use of the case method? Every case considered in class is the subject of many questions, specific questions, searching questions by the instructor. Not all of them are put to a single student; rather, each question is, in general, put to a different student or to several different students; for the object is to draw the *whole class*, not this or that member of it, into a Socratic dialogue with the instructor. Thus no student can doze or daydream or prepare the next case while one of his classmates is reciting. Any student is likely to be called on at any moment; and it is our purpose to let no class period go by without bringing every student into the discussion several times.

Not many cases can be treated thus exhaustively in a class period. This does not seem to us to matter. Spending the whole class period on a single case may be the most economical use of time—so long as the cases for discussion are selected from the assignment in such a way that the students do not anticipate them and limit their preparation accordingly.

We are not disturbed by the fact that, using this approach, it is impossible to cover in class all the material in the case book. Mountains of material make full coverage impossible by any method. No army has troops shoulder to shoulder all along the front. Instead, strong points are held, strong points so situated that they dominate the terrain between. The cases for class discussion are selected on the same

5. O'Meara, *Legal Education at Notre Dame*, 28 Notre Dame Law. 447, 453-54 (1953).



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Joseph O'Meara has been dean of the Notre Dame Law School since 1952. A native of Ohio, he received his A.B. from Xavier University and his LL.B. from the University of Cincinnati. Admitted to the Ohio Bar in 1921, he was in private practice in Cincinnati before accepting his present post.

principle.[6] Beyond this, we recommend a standard text in each course to help the student develop a coherent view of the subject as a whole.

There are signs that the case method is dying out in American law schools. Perhaps these are fighting words. Just the same, the evidence seems to indicate that the "case method" is becoming merely the jumping-off point for lecturing.[7]

I can understand well enough the reasons for this trend—if it be a trend, and I am persuaded that it is. To begin with, the case method is ill-suited to large classes. In the words of an English law teacher, Professor R. H. Graveson of King's College, London, "the effectiveness of the system [is] in inverse proportion to the size of the class".[8] Doubtless, this, too, is a hard saying, but I believe it states the fact. The case method, moreover, is very time-consuming; and it is impossible, using it, to cover in the time allowed all of the material a conscientious instructor would like to cover. So the pressure is very great to lecture, for this makes it possible to get over a lot of ground. Law teachers like to talk, anyway; and, of course, it is a great deal easier to expound one's own views than to ask those penetrating questions which provoke that very rare activity—original thinking. All of these reasons help to explain why the case method, in my opinion, is being replaced by the lecture method of earlier days.

At Notre Dame we are convinced that lecturing to students is not the best way to make lawyers. When lectures are relied on, the wrong man is doing the work. I say this to our students to try to get across to them what I mean by that. "Suppose at practice time the members of the football squad lined up along the edge of the field and the coach practiced running and punting and tackling and blocking. If he did all of the practicing and the members of the squad just stood and looked on, what kind of team do you think you would have?"

Every virtue, pressed too far, becomes a vice. So it may not be literally true that the function of a teacher is to ask rather than to answer questions, but it very nearly is. As a matter of institutional policy, therefore, we emphasize intensive training in analysis through rigorous use of the case method in the first year.

Preoccupation with close analysis of cases, if continued beyond the first year, leads to boredom on the part of students. Moreover, it's not enough to know how to read cases and extract therefrom what Cardozo called the "kernel".[9] Much more is required: a lawyer must be able to *use* cases in the resolution of concrete controversies. This is an art and, as such, requires long practice. In the second and third years, therefore, as a matter of institutional policy, we leave the case method and emphasize, instead, the problem method, which is just what its name implies—the method whereby students learn law by *using* it in working out concrete legal problems.[10]

Members of the faculty teaching second- and third-year courses concentrate in class on problems carefully worked out and mimeographed in advance. The problems are of such nature that a student is wholly unable to cope with them unless he has read and mastered his casebook assignment, but the class period is devoted to the problems rather than to the assigned material in the casebook.

As the preceding paragraph implies, we continue to use casebooks even after shifting to the problem method. In that connection I venture to observe that, in my view, casebooks are becoming progressively unsatisfactory. This is due in the main, I think, to the same influences which have undermined the case method in the classroom. Thus, for example, casebook makers feel impelled to include enormous numbers of cases; and, in order to stay within some semblance of reasonable limits, are accordingly required to edit the cases until, frequently, only bits and snatches of them are left. I suggest this misses the point of the case method.[11]

(Continued on page 668)

6. *Cf.* Griswold, *Law Schools and Human Relations*, 1955 WASH. U.L.Q. 217, 230: "It may well be that the next great developments in legal education will be in the direction of consolidating and simplifying. As one of my friends has said, we have for too long been teaching less and less about more and more. We should now reverse this tendency, and consciously seek to teach more and more about less and less. Or, as one of my colleagues has said, we should sink some shafts, but not try to make tracks over the entire field."

7. *Cf.* Fuller, *Legal Education and Admissions to the Bar in Pennsylvania*, 25 TEMP. L.Q. 249, 263 (1952): ". . . I am convinced that there is a decline in the use of the case method over the country as a whole. To avoid misunderstanding, it should be added that by 'the case method' I mean generally a method which involves a joint exploration of problems by instructor and class as contrasted with a method designed primarily to convey information from the instructor to the class."

8. 3 J. SOCY. PUBLIC TEACHERS OF L. 104 (1955).

9. NATURE OF THE JUDICIAL PROCESS 29 (1921).

10. See Cavers, *In Advocacy of the Problem Method*, 43 COL. L. REV. 449 (1943).

11. *Cf.* HARV. L. SCHOOL, DEAN'S REPORT 1955-56, pages 4-5: ". . . casebooks and other teaching materials which undertake to deal comprehensively with any particular area have become long and filled with details and difficulties. The careful teacher, approaching complex problems with thorough analysis and great research, does not like to leave any item or variation uncovered. Odd as it may seem, some of the new casebooks may be too good to be the most effective for teaching purposes. They may put before the student more detail than he needs at that stage of his development. In this way, they may occupy too much of the student's time with the complexities of problems and leave him with too little of background, approach, techniques, and the other basic skills which will enable him to deal adequately with the varied problems (many of them now undreamed of) which he will meet in his professional life."

Why I Believe in Legal Aid:

Equal Justice for All in America

by Glenn R. Winters · *Executive Director of the American Judicature Society*

In this article, the author discusses the meaning of legal aid from various points of view—examining the program's importance to the legal profession, to the citizens of the communities that have legal aid services, and to the country as a whole. The article is taken from an address before the Toledo Legal Aid Society and the Toledo Bar Association last February.

It would be possible to answer the question in the title very quickly and adequately by simply referring to the fact that "legal aiders" are such nice people. I am thinking not only of my legal aid friends in the American Bar Center, but also of a host of others I have met and become friends with in legal aid offices all over the country. There is something inherently ennobling about trying to give a break to somebody less fortunate than yourself, and that is what the daily work of legal aiders consists of. They just can't help but be nice people.

But there are other and more substantial reasons why I believe in legal aid. I am a lawyer, and it is natural to think first of the things about legal aid that appeal to me as a lawyer. Legal aid is important to the members of the legal profession because it relieves busy lawyers of burdens they cannot afford to and should not have to bear. Lawyers all know and acknowledge that every person in legal difficulties has a right to legal counsel, whether or not he can afford to pay a fee. In literally countless instances busy practitioners have let their regular work wait while they devoted hours, days, weeks to cases from which they had no hope of remuneration. It will be a sad day for the legal profession when no lawyer ever does this, for it makes a better man of him. I wish I could tell you the story of what was done a few months ago by a fine Michigan lawyer of my acquaintance in behalf of a young man who was suddenly plunged into a serious personal crisis through no fault of his own. The lawyer spent a great deal of his own money on the case, as well as a shocking amount of time, and once he was contemplating a trip to New York on it at his own expense. At the end, he sent the boy's parents a bill for twenty-five dollars, solely to bolster their pride. Twenty times that amount would have been less than adequate.

Cases like that don't buy the baby's shoes, and more than a few of them would bankrupt any lawyer. In smaller communities the local lawyers usually can and do bear the burden, but in cities like Toledo it assumes crushing proportions. If it is left to the casual attention of lawyers in their offices, the work will not be evenly distributed, for the more easy-going lawyers will find themselves doing nothing else, while their more practical-minded brethren dodge their fair share, and not everybody who needs the service will get it. What a genuine relief to a busy lawyer to know that there is in his community a good law office, staffed with competent attorneys, maintained for the express purpose of serving those clients, so that it is not a question of his finding the time to take them on or leaving them unserved.

This is not to imply that where there is a legal aid office, lawyers never take cases like the one I mentioned. In fact, that one arose in a city that has a splendid legal aid office. But where there is legal aid service, the lawyers know that the client will get what he needs whether they are in a position to do it for him or not, that the work will be done by lawyers specializing in and skilled in the type of cases such clients have, and that the cost of it will not fall on any one individual. That is worth a lot to any lawyer.

Legal aid appeals to me as a lawyer also because of the possibilities it offers in the training of lawyers. The law schools do their job well, but their graduates get out knowing

very little about what to do when confronted with a client. It is not fair either to the young lawyer or to the client for him to get his practical experience at the client's expense. The hitch has been that there is nothing in the legal profession comparable to the hospital for doctors. Forward-looking leaders in both legal education and legal aid are coming to see that the legal aid clinic can be made to render a useful service in that respect. To be sure, not all professional services in a legal aid clinic can be turned over to student lawyers, and no doubt in many instances it would be easier and quicker for the supervising attorney to do the work himself, but all the same, a growing list of law schools and legal aid societies are establishing co-operative arrangements to the benefit of both.

Legal Aid . . . *Better Public Relations*

In the third place, legal aid is important to the legal profession because it is a most important and indispensable tool for improving the standing of the profession in public esteem. Most people are unfamiliar with law and lawyers, and they have gained from radio, television, movies, comics and crime novels the impression that lawyers are people to stay away from—unscrupulous operators who find "loopholes" in the law and charge exorbitant fees. Many people go without needed legal services for that reason, or else turn for help to non-lawyers they think they can trust. The very existence of a legal aid society, its very line in the telephone directory, is a standing denial of that concept of the legal profession. Every client who goes out of a legal aid office with the smallest legal problem solved is another friend of a profession that needs all the friends it can get. And every legal aider knows, of course, of the small legal aid case that developed into or indirectly led to the big case that was taken by the downtown lawyer on a regular fee basis. I have heard lawyers stand up in a meeting and protest the establishment of a legal aid office on the ground that it would take legal business away from them. They were, no doubt, the type of lawyer I have heard of who is supposed to have remarked that he had two twenty-five-dollar cases in his office plus a lot of little ones. But in all seriousness, a legal aid office, supported by a lawyer referral service, can serve the Bar as well as the public by making more people aware of the services the profession has to offer and encouraging them to take their legal problems, both small and large, to lawyers instead of to unauthorized practitioners. The members of the Bar have more, not fewer, paying clients where these services are offered to the public.

The organization by which I am employed, the American Judicature Society, has for its object "to promote the efficient administration of justice". I believe in legal aid not only because of what it does for the lawyers, but also because of its importance in the attainment of the Judicature Society's objective. The right to the assistance of counsel is one of the fundamental rights guaranteed by the constitutions of the United States and most of the states, along with grand jury indictment, confrontation of witnesses, trial by jury, and a half-dozen other things that we count as basic to our concept of criminal justice. Counsel is important and necessary also in civil cases. It is technically possible in many instances for a party to plead his own cause (although I have always heard it said that the man who acts as his own lawyer has a fool for a client), but in so doing he increases the burden on the judge and lessens the chances of justice being done. "Assistance of counsel" is twofold. It means assistance to the court as well as to the parties before the court. Lawyers are officers of the court, and the judge relies on the assistance of those officers. Without them it would be a physical impossibility for him to handle the case load of his court. Where there is no legal aid, the judge may assign counsel, but lawyers so assigned are often lower-grade talent waiting for such assignments, or else the assignments go to good lawyers who are too busy to do an adequate job on short notice and probably with little or no experience in criminal law. They are never assigned in civil cases. It is important that all cases, large and small, civil and criminal, be decided right, and legal aid helps to make it so.

It is proper to mention at this point some of the activities of the National Legal Aid Association that make a substantial contribution toward the betterment of the administration of justice. In conjunction with the Special Committee on Legal Aid of the American Bar Association, the N.L.A.A. has secured a Ford Foundation grant for the active promotion of expanded legal aid services in criminal cases throughout the country, and in conjunction with The Association of the Bar of the City of New York, with the aid of funds supplied by the Fund for the Republic, they are sponsoring a survey of the various forms of criminal legal aid now in existence to determine which type of service and organization is best adapted to the needs of the various types of communities and clients. The N.L.A.A. and its constituent organizations like yours have been a major force in making a success of the Uniform Reciprocal Enforcement of Support Act.

I am a lawyer, and so I am interested in legal aid as it affects the legal profession and the administration of justice, but I am also a citizen of my home community, a taxpayer, a home owner, and the father of a family. Legal aid appeals to me because of the important part it plays in the life of a community. This is outlined very well in a little pamphlet "Why Legal Aid in Your City?" published by the National Legal Aid Association. Legal aid is good for the city's economy. A large proportion of legal aid cases are of a petty nature, involving only small amounts of money. In the course of a year, however, the amount collected or saved by defending unjust

claims for persons who would otherwise be a burden on the city, is substantial. Through their good use of the Uniform Reciprocal Enforcement of Support Act, the various legal aid societies have saved millions of dollars in support of dependent children from public funds by reaching across state lines to compel support by the parents responsible for them.

The home is a consumer unit and we cannot list the financial benefits of legal aid to a community without taking into account the homes preserved and re-established through its services. However, it is foolish to speak of priceless human values only in terms of money. The good effect of legal aid on the happiness, well-being, future citizenship and productiveness of the children of those homes is incalculable.

A legal aid office in a city renders more effective the work of the other welfare agencies of the city. It relieves them of time-consuming burdens that are more or less routine to a trained lawyer; it helps them to recognize legal problems and give them proper attention at the right time; and it can give legal assistance to the other agencies not only for their clients but also in matters of agency concern such as remedial and preventive legislation. No better testimonial to the substantial worth of a legal aid office to a community can be found than the many instances in which, after a trial period, a place has been made in the hard-pressed budget of a local Community Chest for financing the work of a new legal aid office.

I am a lawyer; I am a citizen of my home community; and I am also an American. As a citizen of this wonderful country of ours, I am glad for legal aid.

Equal Justice for All . . . *The Essence of America*

I am glad for legal aid because to me it embodies and symbolizes the essence of what we mean when we use that beautiful though much-abused word "Americanism". In America, one man is not high and another low, one noble and another base. There are no rights in our land that are enjoyed by a few while the rest look enviously on. In America, every man is king. How proud we are that this is so! We know, of course, that there are countless differences—differences of wealth, intelligence, health, stature, and even complexion. But in America, thank God, we all stand equal before the law. But do we? Only to the extent that we have access to the machinery of justice for the enforcement of our rights. A right without a remedy is but a mockery. For millions of Americans in cities like Toledo, it is the existence and availability of the services of a legal aid office that makes them equal to the rest of the world before the law. It is the legal aid office, whether they ever pass through its doors or not, that makes America what it is to them.

Americanism means championing the underdog. Do you remember back in 1938 or 1939 when tiny Finland was crossing swords with Russia? It was an unequal contest, and the victory of Russia was inevitable. But how enthusiastically we Americans cheered the Finns' few military successes! That was long ago when Hitler was the menace to world peace; the Iron Curtain had never been heard of. We were not fond of the Reds, even then, but mostly we cheered Finland because Finland was David and Russia was Goliath, and we so wanted David to win. I doubt if Hitler's Nazis felt the same way. Americans love an underdog. They cheer for whatever baseball team is playing the New York Yankees, and I can remember not so very long ago, when I was in college in Ann Arbor, when they cheered whatever football team was playing the Michigan Wolverines.

The typical legal aid client is an underdog. He has not been very successful in life, or else he would not be within the legal aid financial eligibility bracket. And now misfortune of some kind has come his way. The chances are that his controversy is with someone more favorably situated—perhaps an unscrupulous tradesman or business man, an insurance company that won't see things his way, or just a mean old landlord. In the typical instance the legal aid client is a helpless, poorly-armed David; his adversary is Goliath. Neither huckleberry pie, ice cream, the World Series nor Howdy Doody is so thoroughly, wholesomely and heart-warmingly American as to step in and take that poor fellow's part and see him through to his little victory against the fellow who would have had his way unchallenged in most parts of the world.

I am a lawyer, I am a citizen and taxpayer of my community, I am an American, but, more broadly, I am a member of the human race, and I am a Christian. I am proud of legal aid because it is one of the brightest spots in the long, dark history of man's painful climb from savagery. It is a testimony to our faith in the universal brotherhood of man, which is a part of the universal fatherhood of God. The first legal aid

Fabian Bachrach

Glenn R. Winters has been with the American Judicature Society since 1940. A native of Nebraska, he is a graduate of Spring Arbor (Michigan) Seminary, and received his A.B. (1934) and his LL.B. (1936) from the University of Michigan. He is the author of several books.

society in America got its start helping not Americans but German immigrants in New York City, nearly a century ago. In most American cities today legal aid stands as a shield and defender of various minority races and groups.

And—during the earthly life of the man who became the defendant in the most famous criminal trial of all time, and who was wrongfully sentenced to death for lack of an advocate to plead the valid defenses which He had, He spent his time largely among the "common people", who "heard Him gladly", and it was He who said "blessed are the merciful", and His biographer says that "when He saw the multitudes He had compassion on them".

I believe in legal aid because in the book that tells about that man I read that pure and undefiled religion consists of two things. One of them is to keep one's self unspotted from the world. The other is to visit the fatherless and the widows in their affliction. Not all legal aid work is in behalf of widows and orphans, but enough of it is so that organized legal aid constitutes one of the greatest of all mass fulfillments of that great Biblical command.

These are the reasons why I believe in legal aid, and why I am proud to have a small connection with such wonderful people and their wonderful work.

Views of Our Readers
(Continued from page 590)

Professional Courtesy: Presumption of Honesty

How many times have you heard a client, friend or fellow attorney say, "That lawyer is dishonest, he sold out?" The variations in remarks of this type are numerous, but the tenor is always the same.

Did you say to the speaker, "Our profession is composed of fine men whose conduct is under constant observation by a skeptical public and we are supervised by bar associations and the courts. No other business exerts as much control over the actions of its members for the protection of the public. I do not personally know the lawyer you think is dishonest, but I am sure he is honest. Very probably if you knew and understood all the circumstances, you would agree."

Do we thus defend our fellow lawyers from such remarks? I have heard a great many such conversations and very seldom do any lawyers present make any such defensive remarks, perhaps better designated as, *an expression of confidence in fellow lawyers.*

Practically all lawyers seem to be burdened by a basic inferiority complex revolving about a lack of confidence in their ability as lawyers and an exaggerated opinion of the abilities of others. Our business is conducive to such a feeling. There is little certainty in law and its application to facts and any conclusion is constantly scrutinized by opposing lawyers, the public, clients and the courts. No wonder it is difficult for lawyers to be confident in the face of this.

This inadequacy leads to a desire to agree with any remarks tending to make us feel superior to our fellow lawyers. Let's face it, we like to hear derogatory remarks about other lawyers.

Often, this attitude leads in a vicious circle to feuds between lawyers because any remarks you make about other lawyers are often reported back to the subject himself. Any member of the public likes to hear one lawyer criticize another because the criticism fits in with the listener's view of lawyers and you may rest assured the remarks will be repeated often and modified through repetitions. It is said after words are quoted through three mouths, the original speaker fails to recognize them.

Be fair to your profession. Compare lawyers with other business classes. Don't you believe that your fellow lawyers are above them in fairness as a group? We lawyers have fallen victims to propaganda created by the public's conception that lawyers are dishonest.

What are the benefits of an attitude of confidence in our professional brethren?

First, your own stature will rise in the eyes of others. We all admire someone who refuses to gossip. We like someone who has confidence in others and will forcibly express that trust.

Second, you will be proud of yourself. It is not nice to repeat gossip or criticize others. Most gossip or remarks are unfounded and you will receive a pleasure in giving to your fellow lawyers the presumption of innocence given to everyone. Each lawyer should be considered honest until proved guilty of dishonesty by a preponderance of evidence. Many condemn a man's reputation on a shred of hearsay because the condemnation is desired.

When we publicly criticize a fellow lawyer we are sitting as judge without jurisdiction. It is only our right and duty as lawyers to report any unprofessional conduct to the proper authority. We have no right to express publicly any personal views derogatory of other lawyers. To do so is disloyalty to the profession and reflects only our individual lack of character.

Third, the profession will benefit. Our public relation programs will fail to inspire trust in our profession if we lawyers do not have that trust and express it.

Do not gossip yourself and discourage gossip by the public. You will financially benefit and elevate your own self-esteem.

CHARLES M. COOK
Carthage, Missouri

A Twentieth-Century Problem:

Administrative Law in Great Britain

by George Winder, M.J.I., F.R.E.C.

Mr. Winder is concerned about a problem that has perplexed and worried many Americans. The twentieth century has seen a great legal revolution in the English-speaking countries. Administrative law, virtually unknown in common law nations before World War I, has grown with tremendous speed, and hundreds of quasi judicial bodies now promulgate orders, investigate violations of those orders, and mete out punishment all without any intervention by judge or jury, and often without many of the traditional safeguards that have always accompanied common law trials. Mr. Winder recognizes the fact that such procedures may be necessary in an economy which is coming more and more under the control of the state, but he raises a disturbing question about the survival of the rule of law in such an atmosphere.

The great heritage that ancient Rome left to modern civilization was the conception of the rule of law. Perhaps the greatest service that the British people have performed for mankind has been to develop and spread this heritage throughout many parts of the world which have never known the sway of Rome—including her own Dominions and, not least of all, the United States of America.

If there is one institution of which the British people are proud, and which, until a few short years ago, possessed their absolute trust and confidence, it is their legal system which, under the aegis of the High Court, has evolved over many generations until it has become the admiration of lawyers of many lands.

In an article in the *Reader's Digest* of December, 1952—condensed from the *Winnipeg Tribunal*—the American lawyer, Karl Detzer, writes: "I am convinced that British justice is fairer and faster than its American counterpart. Punishment of the guilty is more certain, the innocent are more vigorously protected, and public safety is better served." He gives, as his reason for this, the complete freedom of the British courts from the machinations of the politician. "No political influence," he writes, "direct or indirect, is tolerated anywhere in the administration of British justice."

This American lawyer's opinion accords with that of no less a man than Voltaire, who, over a hundred fifty years ago, wrote that, in travelling from France to England, he had passed out of the realm of despotism into a land where the courts might be harsh but where men were ruled by law and not by caprice.

When the British legal system can be praised so highly, why has there lately developed concerning it a measure of doubt—as yet like a cloud on the horizon—but nevertheless persistent in the minds of some British lawyers?

As far as the traditional British courts are concerned, the confidence of the people is as justified as ever. The doubt lies in the fact that, alongside these ancient institutions, there is growing up a new form of legal tribunal which is beyond the jurisdiction of the High Court and quite new to British legal principles.

Before 1914—a year which marks the end of so many accepted ideas—the authority of the High Court over the British legal system was complete. No one could be punished, no fine imposed, no injury received, nor any tort inflicted, without the victim having the right to appeal to a British court of justice. As that great guide to the British Constitution, Professor Dicey, has pointed out, the very basis of British justice was the fact that the whole of her legal system came under the one authority—that of the High Court.

The legal code was not split into two parts as it was in France—one interpreted and enforced by the ordinary courts, the other a system of so-called administrative law applied by officers. The idea of administrative law and administrative courts

was wholly repugnant to Dicey. It implied that the executive and the administration could be independent of the judiciary. Such an independence he believed to be contrary to the British conception of the rule of law.

There are strong reasons for believing that the unity of the British legal system under the High Court was due to the fact that, in Great Britain, the state played little part in the economic activities of the people. The great work of the courts, apart from their criminal jurisdiction, was to see that the rights of individuals were enforced. As the state was seldom involved, it allowed the courts complete freedom from political pressure of any kind. Such administrative rules as there were —as, for example, those under the Merchant Shipping Act or the Factory Acts—being comparatively few, could be enforced quite easily by the ordinary courts.

The economic system of France, on the other hand, had been subject, ever since the days of Louis XIV, to a wide system of control exercised by the district Intendants, who took the greatest care that their exceptional jurisdiction should be continually extended. These controls were one of the primary causes of the French Revolution, but, as de Tocqueville pointed out, they survived to a far greater extent under the Republic than is popularly supposed, and, so that they might be effectively enforced, administrative law survived with them.

The First World War . . . *A Changed Economy*

It was not until after World War I that, in Great Britain, ideas inimical to the free economy began to be extensively reflected in British legislation, and the powers of certain Ministers of the Crown and their officers were increased beyond anything hitherto known in modern times. Under the old system, the sole concern of the British courts was justice for the individual. Consequently, all their rules of evidence and procedure were evolved solely with that consideration in view. It was never conceived that they should have to deal with the thousands of regulations necessary to administer an economy with speed and efficiency. As a result, they were quite unprepared and unsuited to meet the changed conditions brought about by economic planning.

Parliament realized this, for, with the new legislation, it provided for forms of legal enforcement under tribunals, which were quite new to British legal tradition. It also provided that the Ministers of the Crown, and the officials responsible for enforcing the new legislation, should have wide discretionary powers which were placed beyond the jurisdiction of the High Court.

These new tribunals are so alien to British ideas that their true nature is not yet fully recognized, but there is no gainsaying the fact that they are able to inflict very heavy fines on those who appear before them, and, to enforce those fines, they may sell up the offender's property. For the first time in many generations, a British subject can stand before such a tribunal so far defenseless in that he is deprived of his ancient right of appeal to a British court of law.

Perhaps the most typical example of the new kind of administrative court is provided by the Tribunal of the Milk Board. In 1932 the British Government decided that the free contract system should no longer apply to the sale of milk, and that its distribution from the farm to the consumer's doorstep should be completely within the control of the state-created Milk Marketing Board. The imposition of the necessary discipline upon farmers to effect this was not so very easily enforced. Shortly after the Board's inception, it had to deal with farmers who undercut its fixed prices in the hope of increasing their sales. It is interesting to speculate what might have happened to these offenders had they been arraigned before the ordinary courts, charged with the entirely new crime of selling perfectly clean milk too cheaply. Fortunately for the Board, it was able to bring such recalcitrants before its own tribunals.

These were made up of milk producers little inclined to bias in favor of a rival who had undercut the price of their product. After listening to such a trial before such a Tribunal, one lawyer has described how he saw the accused pronounced guilty and heavily fined—on the unsworn hearsay evidence of the Board's own servants. He also pointed out that the Board acted as judge, prosecutor and recipient of the fines it inflicted.

It must not be thought that British judges were unconcerned at this limitation of their jurisdiction. The Milk Board's judgment could only be enforced by a court order. When applications were made for such orders, some judges put up considerable resistance, and attempted to review the reasons for such judgments.

Judge Tobin, asked to sign such an order, said: "Am I to understand that certain of the King's subjects can be fined by some kind of tribunal sitting in a room to which the public are not admitted!" On being assured that this was so, he added: "It seems contrary to our law. I thought the essence of British justice was openness."

However, the disapproval of British judges was of no effect, and it soon became evident that there was a new punitive body in Great Britain, completely beyond the reach of a High Court judge.

To allay public suspicion, however, a Departmental Committee under the chairmanship of Viscount Falmouth was set up to report on this new legal procedure. In its finding supporting the tribunals, the Committee stated: "There is also a possibility that the Courts, either from imperfect understanding of the schemes, or from lack of sympathy with them, might not inflict adequate penalties, particularly in the case of such offences as undercutting, where the interests of producers as a whole might appear, on a short view, to be contrary to those of the public. Even in serious cases under

the ordinary law, these courts do not usually impose the maximum fines for offences; indeed, the expectation that smaller fines would be imposed by the Courts than by the Marketing Boards has been used as an argument in favor of the former tribunal. Moreover, undue leniency to offending producers under the marketing schemes might cause such dissatisfaction to other producers, and so place a severe strain on their loyalty, thus leading to a breakdown of the schemes."

In the Name of Expediency . . . *A More Compliant Tribunal*

So the principle was accepted that, when the judgments of the courts are unlikely to suit the purposes of the state, then, in the name of expediency, a more compliant tribunal should be appointed in their place. So might Louis XIV have reasoned when he promulgated the following decree: "It is moreover ordered by his Majesty that all disputes which may arise upon the execution of this order, with all the circumstances and incidents there unto belonging, shall be carried before the Intendant to be judged by him, saving an appeal to the Council, and all the courts of justice and tribunals are forbidden to take cognizance of the same."

De Tocqueville, who quotes this decree in his *State of Society in France before the Revolution of 1789*, also reminds his readers of the unity of the British legal system and the difficulty British people had of even conceiving an idea so alien to their thoughts as "Administrative Law".

"The difficulty of rendering these terms into intelligible English". he tells us, "arises from the fact that at no time in the last two centuries of the History of England has the executive administration assumed a peculiar jurisdiction to itself, or removed its officers from the jurisdiction of the courts of common law. . . . It will be seen that the ordinary jurisdictions of France have always been liable to be superseded by extraordinary judicial authorities when the interests of the government or the responsibility of its agents were at stake. The arbitrary jurisdiction of all such irregular tribunals was, in fact, abolished in England in 1641 by the Act under which fell the Court of Star Chamber and the High Commission."

De Tocqueville did not conceive that, many years after his death, those irregular tribunals beyond the reach of the High Court would be re-established in the country whose legal system he so much admired.

After World War II, the advance of "administrative law" in Great Britain continued apace. The most outstanding addition to the new system was the Land Tribunal, set up under the Agricultural Act. This Act provided for the dispossession of farmers from their land if Agricultural Committees considered them inefficient. Their age-old right of access to the ordinary courts was denied them, and, instead, they were permitted to appeal to this entirely new court, the Land Tribunal.

The members of this body were appointed by the Minister of Agriculture himself, but, as his servants had initiated the proceedings against the farmer, this practically made him the judge in his own case.

When the Conservatives were returned to power, they amended the Agricultural Act by providing that appointments to the Tribunal were, in the future, to be made by the Lord Chancellor instead of by the Minister. Otherwise they left the Act very much as it was passed by the Socialist Government.

Although they have the power to inflict heavy fines, and, in the case of the Land Tribunals, can recommend to the Minister that a man be deprived of his farm, all these new administrative courts are perfectly free to decide their own rules for the conduct of the cases before them. They can ignore those principles of procedure and evidence which, in the ordinary courts, have grown up over the years with the sole aim of protecting the rights of the individual. Their power is very nearly absolute in their particular field, as they are answerable only to the Minister under whose authority they have been set up. In his turn, the Minister may act with a wide discretionary power completely beyond the reach of the High Court.

George Herbert Winder was born in Wellington, New Zealand, in 1895. He is a member of the Institute of Journalists, a working dairy and poultry farmer in Sussex, and a former Solicitor of the Supreme Court of New Zealand. He is a founder of the Tariff Association of New Zealand, which sought to lower tariff-barriers, particularly those against the mother country, and of the Tariff Reform Association of New South Wales, which later became the Tariff Section of the Sydney Chamber of Commerce.

C. J. Hamson, Professor of Comparative Law at the University of Cambridge, has pointed out the danger to the British legal system arising from the new administrative tribunals. In his book, *Executive Discretion and Judicial Control*, he writes: "What we have to observe today is that the English system of a universal jurisdiction has in reality broken down, with the result that the entity which today wields the most real power,—the Minister and his Department,—is in England subject to a merely formal legal control, and is beyond all effective judicial supervision."

The Conseil d'Etat . . . *A Model for Britain?*

Professor Hamson rather nostalgically recalls Dicey's fears of administrative law, but he believes that,

(Continued on page 665)

AMERICAN BAR ASSOCIATION

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Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

Forsake Not the Law of Thy Mother

It is the land that freemen till,
That sober-suited Freedom chose;
The land, where, girt with friends or foes,
A man may speak the thing he will.

A land of settled government,
A land of just and old renown
Where Freedom slowly broadens down
From precedent to precedent.

Thus England stands forth before all the world an example of fearless freedom. Can we, who have inherited her language and her law, pass the same scrutiny? Have we our Cokes who would defy tyranny and act as becomes a judge? Have we our Hampdens alert to resist injustice? Would we, with Byron, refuse to change our free thoughts for a throne? If not, we are faithless to the memory of Burke and Fox and Pitt and Camden and unworthy of the tongue that they made ring on our behalf.

Two Indispensable Causes

Among the objects of the Association are the promotion of the administration of justice and the application of knowledge and experience of the American Bar Association in the field of the law to the promotion of the public good.

It would be hard to conceive of any higher aim than to make legal advice and help readily and effectively available to all. To this end, we rightly concern ourselves with the interests of the poor and helpless and of those who need a lawyer, who have never consulted one, who do not know where to turn to find one, who are apprehensive of the cost and whose means are frequently modest but of doubtful adequacy.

From small beginnings, with scant sinews of war, the causes of Legal Aid and Lawyer Referral Services have gradually found foothold and grown in stature until now both causes are rapidly achieving recognition as indispensable to the proper functioning of the organized Bar.

This has not been accomplished except by the untiring effort of many unselfish men of vision. They seek no credit and no honors for themselves. They are devoted to public service; and their name is legion. Much has been accomplished but much remains to be done. It behooves us to be ever on the alert, seeking the opportunity to develop and expand these worthy activities.

Glenn Winters speaks eloquently on the subject. We have the good fortune to be able to present his views in the pages of this issue.

Free Government and Legal Education

The continuity of free government—a "government of laws" as distinguished from a government of men—depends in large part on the course and direction of modern legal education.

A "government of laws" without lawyers is an impossibility. The alternative to a "government of laws" is men who are above the law and a law unto themselves, to-wit, dictatorship and the police state. As Mr. Vishinsky so bluntly said, in the Soviet system courts and lawyers are but instrumentalities to further the policies of the party in power.

In any "government of laws", lawyers have an indispensable part. A "government of laws" can only survive if the affairs of the people and of the government are at all times conducted according to law under the guidance of lawyers, either by way of advice or through adjudication in the courts. Lawyers and courts manned by lawyers are necessary to preserve the private rights and basic liberties of the people and to protect them against attempts by the government itself to exceed its statutory and constitutional limitations.

In the light of the premises, the training of law students to become lawyers that will meet the challenge of preserving a free society under law, appropriately engrosses the best thinking of our law schools, since they are now responsible for close to 100 per cent of all legal education in this country.

Only rarely does one see a comprehensive view of a modern legal educational program forthrightly put on paper for all to see. While various approaches are possible and doubtless desirable, the JOURNAL is pleased to present the outline of such a carefully articulated plan in the article entitled, "The Notre Dame Program of Legal Education" by its Dean, Joseph O'Meara.

He Was Not Disobedient Unto the Heavenly Vision

On June 18, 1957, in a lovely stone church shaded by fresh early summer foliage, a clergyman read from the fifteenth chapter of John: "Greater love hath no man than this, that a man lay down his life for his friends".

Arthur Vanderbilt laid down his life for his friends. No human body could have long withstood the strain to which he willingly and deliberately subjected himself in carrying out his mission. That mission was the improvement of the administration of finite justice and to it he had dedicated himself. In his private practice he had been a hard fighter who asked and gave no quarter. In the same spirit he waged his contest against delay and inefficiency in court proceedings. When his body rebelled he regarded it only as notice that there was so little time to complete the great task to which he had set himself. There was not a corner of the land where the methods by which men sought justice did not bear his impress. The good works that he had done were a monument more splendid and enduring than anything erected of brick or stone by an oriental potentate. Yet still he labored to make the judicial system that he headed a more perfect embodiment of his dream of simple and speedy attainment of the rights of litigants. A magnificent physical and intellectual machine suddenly ceased to function as he hurried to his post of duty at an hour when most of those to whose weal he gave himself still slept. Perhaps it was a beneficent dispensation of providence that he never saw the day when his faculties would not answer the call of his consuming passion for justice.

Editor to Readers

George W. Gale, of Chicago, has favored us with the June, 1957, issue of *The Minute Man*, the official publication of the Sons of the Revolution in the State of Illinois (of which he is the editor), containing an address by Judge Harold R. Medina. The judge was never more eloquent than when he said:

> It is in times of danger and hysteria that freedoms are lost. What Washington and the other Founders have taught us is: in the midst of crisis be steadfast and face the danger calmly. And so the pattern of our liberties was laid down. Whether we like it or not; indeed, whether some of us realize it or not, the fact is that today we live in critical times; and there is grave danger that some or all of our freedoms, such as free speech, freedom of religion, the equality of all men before the law, freedom from unreasonable searches and seizures, the guarantee that our property will not be taken except by due process of law, and others may be diluted, whittled away, diminished or even torn out of the Constitution by amendment, as with the right of a person to refuse to incriminate himself, which has been under open attack.

A Friend of the American Bar Honored

His many friends in the American Bar Association will be happy to learn of a recent additional honor to our friend, Sir Godfrey Russell Vick, Q.C. In September, 1956, he was appointed by the Queen as one of Her Majesty's Judges in the County Courts (Circuit No. 38, London Area). The adjoining picture, taken after his appointment, shows how well he is suited to the judicial wig and gown. As those who have had the pleasure of his delightful companionship at American Bar meetings will recall, he was a guest of the American Bar Association at the Annual Meetings in 1950, 1951 and 1952.

Sir Godfrey was born in 1892, educated at Jesus College, Cambridge, served in World War I as a Captain in the Durham Light Infantry, and was called to the Bar at the Inner Temple in 1917 during leave from France. In 1930 he served as Recorder of Richmond, in 1931 as Recorder of Halifax, and from 1939 to 1956 as Recorder of Newcastle upon Tyne. He became a Bencher of the Inner Temple in 1942, and served in the very important position of Chairman of the Bar Council from 1948 to 1952. He became a K.C. in 1935 and was knighted in 1950. He has been actively interested in the work of the International Commission of Free Jurists and attended the important meeting in West Berlin in 1952.

The Honorable
Sir Godfrey Russell Vick, Q.C.

A Report from France:

The 1956 Convention of the French Bar

by **Raymond Scallen** • *of the Minnesota Bar (Minneapolis)*

When the National Association of Advocates, the organized bar in France, met for its twenty-eighth annual convention, Mr. Scallen was present as a representative of the President of the American Bar Association. On these pages, Mr. Scallen describes the meeting, which took place in the famous Galerie des Batailles.

The National Association of Advocates held its Convention at Versailles from May 17 to 20, 1956.

Of outstanding importance and historical significance, this Convention considered recommendations for the most substantial reforms in the Judicial Code since 1806.

The setting was one of magnificent splendor in the Gallery of Battles of the Chateau of Versailles with centuries of the history of France depicted in the great paintings that give this hall its name. The formal opening of the Convention was brilliant and impressive, for the President of the French Republic, M. René Coty, long a member of the French Bar, was the President of Honor, and he was accompanied by leading members of the Government and the Bar, including M. André LeTroquer, also a member of the Bar and President of the National Assembly.

Along the famous grand staircase were stationed members of the Garde Républicaine in full dress uniform, and after the flourishes of the field music the members of the guard flashed their sabers to the "present." The President and the guests of honor, followed by the delegates, members of the Bar, and their families, then marched up the staircase, and when all had ascended the sabers returned to the "carry".

With courteous recognition, your representative and the representatives of the Bars of various European nations were given places of honor near the President of France. After M. LeTroquer declared the twenty-eighth Convention formally open, Bâtonnier Robert Planty, of Versailles, welcomed President Coty and expressed appreciation of the spirit of fraternity shown by the presence of the representatives of Bars from outside of France, requesting them to convey home to their respective organizations the friendly greetings of the advocates of France.

Me. Marcel Rémond, President of the National Association of Advocates of France, referred to President Coty's distinguished career as a member of the Bar and "the defender of its traditions and the champion of its prestige". He also welcomed the representatives of the foreign Bars. Outlining the purpose of the Convention, he emphasized the need for procedural reform, stressing a theme very familiar to our ears, namely, that justice be neither delayed nor expensive, and described the work of the Committee which had made exhaustive studies and which was ready to present recommendations for reform of the French Judicial Code.

M. LeTroquer responded, stressing his pride in being a member of the Bar and congratulating the Convention for addressing itself to problems of great importance for the cause of justice.

Next, M. André Cornu told of the work accomplished by the National Committee for the Restoration of the Chateau of Versailles and expressed particular appreciation for American aid in this project.

After the formal opening recessed, the President of the Republic met informally the representatives of the foreign Bars and had a friendly word of greeting and appreciation for them. Later all went out of the Gallery of Battles and witnessed the spectacle of the great fountains playing in their honor.

The next morning, in the historic Chapel of the Chateau, the Bishop of Versailles celebrated a Mass in honor of St. Yves, patron of lawyers, for the delegates. The morning sun shining through the stained glass windows, the magnificent music, and the devotion of the congregation

seeking divine guidance were profoundly impressive.

The delegates then assembled for the first business meeting in the Salle Marengo. Before this meeting commenced deliberations, your representative presented to President Rémond the cordial wishes of American Bar Association President E. Smythe Gambrell, for the success of the meeting, and President Rémond, responding with evident appreciation, in turn expressed his regard and respect for the interest of the American Bar in this meeting of the Bar of France.

The first report was that of Bâtonnier Pierre Chaplet, of Rennes in Brittany. Outstanding as a trial lawyer and a leader in his community, he suffered greatly as a prisoner of the enemy at Buchenwald and Dora. He is a symbol of great heroism, and his devotion to his country and to his profession, his nobility of character, make him greatly respected in France. Bâtonnier Chaplet's report outlined a new system of judicial procedure and gave the fundamental reasons for its development, starting with a proposal for the fusion of the professions of *avocat* and *avoué* (which correspond very much to the relationship of "barrister" and "solicitor"), and the need for partnership. He argued that this was necessary in the modern world. "This evolution is in accordance with the rhythm of the times. It forces us to break with the charm of solitude. The increased needs of clients demand that if our professions are to survive, we must organize our offices to take care of them." He discussed what we would call administrative boards and tribunals, made comparisons between them and the French Court of Commerce, discussed their history in general, pointed out the duplication of effort that existed at present, and recommended that the regular courts should take over matters now presented to the various boards.

Then Maitre Manuel Blanc of Paris outlined recommendations calculated to obviate delays due to jurisdictional questions.

Next, Bâtonnier Henri Dupeyron's theme was "Give us a good procedure and we will bring you good justice". He complimented the judiciary and members of the Bar and stated that since the members of the Bench and Bar were able, it must be because the tools they were using were not suited to modern days that there were delays and confusion in the field of justice in spite of the excellence of personnel. Like Bâtonnier Chaplet, he recommended (1) institution of a simplified procedure following in general that of the French Commerce Courts; (2) unity of the direction of a lawsuit by fusion of the powers of pleading and argument; (3) making uniform and simplified the time within which different steps of procedure should take place; (4) maintaining the accusatory or adversary system with the suppression of the present arrangement for a Judge charged with following the procedure; (5) centralization in the Clerk's office of procedural activity; and (6) a simplified procedure for hearings and the actual trial.

It is particularly noteworthy that both Bâtonniers Chaplet and Dupeyron and their colleagues stressed the value of the adversary or accusatory procedure as contrasted with the present system of procedure in France. They pointed out that a party properly counseled ought to conduct his own lawsuit; that the Judge really did his best work in adjudicating the matter and should not substitute his initiative for that of the trial lawyer. In the present system the Judge does not really have the necessary materials for fulfilling his role, and the advocate's time is so taken up in the preparation of memoranda that, as a result, argument is sacrificed at the trial. He pointed out that the living word is of inestimable value. "The spoken word animates a lawsuit." The lawsuit is "a conflict of souls and of flesh, and cold writing is never sufficient to bring this out". Oral arguments give the parties litigant a double guaranty of public argumentation on an adversary basis and a deliberation that is truly judicial, and a written procedure never produces the same complete result.

Me. C. A. Depondt, of Paris, then presented a report with reference to the application of the foregoing principles in certain methods of proof in connection with the reports of experts, personal appearance and kindred matters.

These reports were received enthusiastically, and after general discussion the Convention voted unanimously a resolution approving the principles that were presented, adopted President Rémond's report, and recommended that these reforms be put in a position where they could be carried into effect.

The Convention decided to meet in 1957 at Douai and Lille with excursions into Belgium and Holland.

On the entertainment agenda: Molière in the Marble Court—luncheon at General Gruenther's SHAPE Headquarters—the Banquet at St. Germain-en-Laye—the trip to Fontainebleau—the excursion by air from Orly to London—space permits only their mention.

Surely the Convention at Versailles marked a high point in the determined efforts of the French Bar to achieve reform of judicial procedure.

Professional Trade-Secrets:

What Illusions Should Lawyers Cultivate?

by **Mortimer Levitan** • ***Assistant Attorney General of the State of Wisconsin***

Mr. Levitan here does to law professors, judges and lawyers what Johnathan Swift did to the institutions and customs of Swift's time in Gulliver's Travels. All readers are warned to take this caricature of the profession cum grano salis.

An illusion is something that deceives by producing a false impression. According to *The American College Dictionary*, an illusion "may be pleasing, harmless, or even useful". If a lawyer believes that he can sing better than Caruso, the illusion is pleasing to himself, but probably not to his family or critical collie. If he has the illusion that he can cook better than the chef at the Waldorf-Astoria, the illusion is harmless—unless, of course, he insists on cooking. The pleasing and the harmless illusions come to a lawyer naturally; only the useful illusions are the rewards of cultivation.

Useful illusions are of two main types: those intended for personal utilization and those intended for distribution to the general public. The personal utilization type may also be described as ego-fodder. Lawyers, like all human beings, are equipped with the instincts of self-preservation and preservation of the species, but frequently more compulsive than either of those instincts is the desire to be important. That is why people run for coroner, for instance; and it may possibly be the reason why some women study law. Human happiness depends more on a well-fed sense of importance than on a well-fed stomach, and a sense of importance can last an entire lifetime on a diet of illusions. The illusions for public distribution are those essential to the preservation and advancement of the legal profession. A doctor, for instance, must create the illusion that his pills cure the malady; the magician must create the illusion that he is sawing the beautiful girl in half; and lawyers must create the illusion that courts always decide cases correctly.

The less said in public about professional trade secrets, the better. However, since most readers of the *Journal* are either members or prospective members of the craft, it may be safe to discuss some of the well-established illusions which merit intensified cultivation.

Illusion No. 1: Teachers of law know what the law is on all subjects.

Unless a law student has the illusion that his professors of law know exactly what the law is on all the subjects they teach, he'll never make a lawyer—indeed, he'll never get through law school. After all, why should a teacher give a passing grade to a student who believes that the teacher doesn't know what he is talking about? Even if a student believes that a professor knows half of the law, how can the student detect when the professor is expounding the right half and when the wrong half? The illusion, unless complete, is worthless. The law professors actually do know what the law was yesterday, and they know what it is going to be in the future, but they don't know what the law is today. With thousands of courts fabricating tons of legal opinions every year—there is, unfortunately, no crop control for opinions—how could the professors possibly read a million words every night, separate the synthetic wisdom from the genuine and authoritatively declare the prevailing law at lecture time the next day? Besides, in law school it really isn't important to know what the law is; the important thing is to understand how the law got that way. If the student acquires some familiarity with the gliding, shuffling and pirouetting the courts went through over the centuries in developing the present, discernible trend in the law, he should acquire some facility in predicting which way the courts will glide in the future. However, no amount of study can confer skill or luck in predicting the

occasional giant leaps in aberrant directions.

While learning the art of juristic divination, the student incidentally—and sometimes incurably—acquires the legal jargon which is so helpful in obscuring the simple, confounding the public, and exhausting the courts. The only conceivable justification for legal jargon must be financial: the public would rather pay twenty-five dollars for a diagnosis of acute gastroenteritis than three dollars for a diagnosis of belly ache.

The professors of law are the only ones seeking to make a science out of law; the judges and lawyers are too busy making a living out of law. Jurisprudence owes a tremendous debt to the teachers of law, not because of their teachings or philosophical endeavors, but because of their classroom dexterity in influencing the future development of the law by imparting just the right amount of english to legal trends. They would have even greater influence if the time between graduation from law school and elevation to the Bench didn't take so long that sometimes the erstwhile student forgets all he had learned.

Illusion No. 2: A lawyer's success depends upon his knowledge of law.

Human beings live by the faith that ability, loyalty, perseverance and industry will be rewarded; and human faith cannot be destroyed by evidence alone. How could they strive and hope if they docilely permitted themselves to believe that the prizes of life are distributed by chance, that all honors are conferred by flukes, that success is achieved by luck alone? Faith and hope are destined to continue, even though illusions routinely substitute for well-deserved recognition and appreciation. And in the field of law, no matter what may be the final appraisal of the practitioner who has outlived most of his illusions, youth must believe in the efficacy of individual efforts.

Droves of successful lawyers would deflate and shrivel away if deprived of the illusion that a lawyer's success depends upon his knowledge of the law. Unsuccessful lawyers, of course, may simply be suffering from illusion deficiency. In the field of law, as in all fields of human activity, a great capacity for self-deception is a prerequisite to great accomplishments, for unless a man can convince himself of his capacity for accomplishing the impossible, he won't accomplish even the possible.

Actually a lawyer's financial success is usually attributable not to legal wisdom, but to solvent clients. There can be no successful lawyer without clients—or satisfactory substitutes therefor. The only known substitutes for clients are (1) lots of money and (2) government service. Incidentally, there are only two classes of lawyers who should enter government service: those who can afford to and those who can't afford not to. As for the money which substitutes for clients, that is a matter of picking out wealthy parents, which is difficult, or wealthy parents-in-law, which is something the dumbest man in the class can do—and frequently does.

A knowledge of law would undoubtedly contribute more to success if the practice of law involved much legal work. In a busy law office the dictionary wears out faster than the statute book—and there is, unfortunately, evidence that neither wears out fast enough. Lawyers can lead their entire professional lives smugly oblivious to judges and courts. Some fabulously successful lawyers manage to acquire million dollar estates—and coronary occlusions—without ever stepping into a courtroom or even talking to a judge, except possibly at the nineteenth hole of the golf course. Much time must be devoted to the acquiring, impressing and preserving of clients—and nothing in the law school curriculum imparts skill in those basic pursuits, possibly because the professors don't know how lawyers come by clients or probably because they'd like to forget. When a lawyer joins lodges and luncheon clubs, takes part in civic activities, angles for directorships, runs for an office he doesn't want and contrives to be present at places and affairs where prospective clients tend to congregate, he is certainly engaged in work, but not in law work. It is the type of work that may consume practically all of the time of the head of a firm who delights in having his sumptuous suite full of clients and well-fed junior partners.

Clients are fascinated by the illusion of learnedness. The lawyer-client relationship is never entirely satisfactory unless the client is certain that he has the most learned lawyer in town—and the lawyer concurs. But just what kind of service does a non-criminal, non-tortfeasor client usually seek? Practically everything except law work! Everyone is presumed to know the law, and many clients mistake the presumption for a verity. That is why so many clients decide their legal questions themselves and solicit their lawyer's advice and assistance on financial problems, domestic difficulties, labor disputes, real estate ventures—anything, in fact, except legal problems. Thus a lawyer acts as accountant, real estate agent, conciliator, negotiator, straw man, messenger, flunky and scapegoat—and if the clients are numerous, important, or rich, he soon acquires a well-deserved reputation for being learned in the law and worthy of a seat in the United States Senate, which is just a hop, skip and jump from the Supreme Court.

It would be a serious error to conclude that the years spent in law school make no substantial contribution to a successful legal career. The study of law involves relentless practice in the difficult art of considering problems abstractly. It imparts some felicity in disregarding personalities, preconceived notions, and irrelevant considerations which obstruct the exercise of sound judgment. It also encourages the development of one of the noblest and rarest of human qualities: complete absence of self-interest in advising others. The knowledge of law ac-

Mortimer Levitan is a member of the Wisconsin Bar and a graduate of the University of Wisconsin (A.B. 1912) and of the Harvard Law School (LL.B. 1915). He has been Assistant Attorney General of the State of Wisconsin since 1922.

quired in law school is useful, too—provided the student also acquires the knack of transmuting legal knowledge into common sense.

Illusion No. 3: Judges know more law than anybody else.

Civilization without judges would be as preposterous as Gilbert without Sullivan, as apple pie without cheese, as television without commercials. Indeed, without judges civilization would never have gained its present toe hold on the human race. We are indebted to our judicial system, rather than our political system, for the survival of democracy in times of depression, war and mass hysteria. The courts have protected the populace from their rulers, men from their fellow men, and women from men. Someday, perhaps, the courts will protect men from women—may that day be long delayed!

Good workmen deserve good tools. Consequently all qualities necessary or useful in the performance of judicial functions should be conferred upon the judges, no matter how many illusions may be expended or damaged in the process. Human beings accept reluctantly the judgment of their peers; how much more palatable the judgment becomes when marinated in occultism! Courts, in order to make their products more acceptable, must be endowed with superhuman knowledge, infinite wisdom and virtual infallibility. Everybody, then, should be indoctrinated with the idea that judges possess those supernatural qualities—everybody, that is, except the judges themselves. A judge should always remain sufficiently human so that if he overhears a whispered conversation about a divine figure in a black robe, he'd know instantly that the subject under discussion was not the judiciary.

For the proper performance of their judicial functions it is unnecessary for judges to know more law than anyone else. Usually the position itself confers merely the illusion of competency; elevation to the Bench seems to confer actual competency. That probably indicates that 95 per cent of the lawyers, if elevated to the Bench, would make good judges—and some of the 95 per cent seem to prosper with modicums of legal knowledge. Fundamentally the judicial function is to decide between contestants; and one may be endowed with the native ability to referee a prizefight without having the physical power to knock out a Jack Dempsey or a Joe Louis. The outstanding judges of beauty contests simply haven't what it takes to be the successful contestant—or any contestant at all, for that matter—but they are good judges nevertheless. The judge at a dog show does not have to know how to bark, point or retrieve.

The most important judicial requirement is a well-developed sense of justice. A sense of justice does not derive from the remembrance of past adjudications; it springs from a sympathetic awareness of the composite experiences, dogmas, hopes, ideals and illusions of the entire community. Courts cannot declare justice; they can merely seek to reflect justice—and whether they succeed depends upon the ultimate verdict of the enduring community concepts. Next in importance is a logical mind—but logic alone may lead to absurdities and injustices. In the juristic field logic is infinitely improved by dilution with mores. And of least importance is some knowledge of law—not a profound knowledge necessarily, but at least sufficient familiarity with the subject to be on conversational terms with the practicing lawyers.

Illusion No. 4: Courts always decide every question correctly.

If only one illusion were to be cultivated, it would be that courts always decide every question correctly. The precious reputation of our courts is dependent upon universal, unquestioning faith in the rightfulness of judicial determinations. People would lose confidence in their courts if malicious, unfounded rumors got around that courts were right only half of the time. In the depths of their grievous disillusionment, the people might even go so far as to dispense with courts entirely and substitute the tossed penny. And then judges and lawyers, as well as their families, would really have something to worry about!

So far as a sound, workable judicial system is concerned, it is not absolutely necessary for judges to believe that they always decide correctly—although that is usually in their credo. It is imperative, however, that judges create the impression that their opinions are correct beyond any possibility of doubt—and sacrosanct besides. Sometimes a judge becomes so expert in concealing all doubts about the correctness of his opinions that no one would suspect he had any—not even his psychiatrist! An opinion can withstand any infirmity except vascillation. An umpire who promptly, resolutely, and incorrectly calls a strike when the ball was wide by a mile doesn't harm the game of baseball; the national pastime could be ruined, however, by an umpire who massaged his chin, then scratched his head, and finally confessed that

(Continued on page 666)

Chief Justice Arthur T. Vanderbilt, 1888-1957

Every age has produced great jurists, the highest designation with the deepest significance which has been applied to men. Usually they walked as simple men among men. Suddenly by their deaths it became necessary to appraise the loss and their achievements. Through them their successors rose to greater endeavor and heights of accomplishment. Words of praise were grossly inadequate, only the work of those who followed could build their monuments.

Such a time and event has come to this generation of lawyers, of judges, of officials of government and the people whom they serve, through the death of Chief Justice Arthur T. Vanderbilt.

The pattern for higher forms of justice, of the administration of justice, has been set for the world by the brilliant life of one man, the leading lawyer of his time.

A highly successful practitioner of law, a teacher of law, a builder of a great law center at New York University—the first of its kind—a drafter of great statutes of administrative law and practice, of rules of court, Chairman of the War Department's Advisory Committee on Courts Martial, a chief justice of a great state whose constitution was revised to include his views and drafts—a lasting pattern for all states—an architect and builder of great principles of judicial reform and practice in all courts, a persuasive speaker and writer, a president of the New Jersey and American Bar Associations, a practical politician who did not seek office and who dared to fight successfully for clean government in his community—all crowded in the compass of a dedicated life. In every field he touched he was a natural leader, acknowledged as such.

And with it all the simple virtues of life, of great and lasting friendships in this and other countries, a devoted husband and father, the enricher of the lives of all students and men and women with whom he came in contact. Such a life has not been lived in vain. No one can measure its value.

He leaves us saddened but illumined by a great light which he created for us, the inheritors and executors of an inexhaustible debt to mankind, of good government by consent of the governed, of the constant improvement of the indispensable administration of justice.

This is but an epitome of a full and fruitful life of his own choosing, a service always to his country. Of him it may be said as did the poet,

> They carry back bright to the coiner
> the mintage of man,
> The lads that will die in their glory
> and never be old.

Surely, surely the armor which this warrior wore when he left us was shining bright and always will be so.

We may reason our way through as we will, but the ties of friendship and affection for a great factor in our lives still control our hearts. For years to come the deep memories of friendship will recall happy contacts always too few in number. They are the lasting indestructible facets of life—we are better for them and cannot give them up. A great man, a great friend, has given up his life for our cause and our children's cause. We shall not forget that.

CARL B. RIX

Milwaukee, Wisconsin

Books for Lawyers

THE BILL OF RIGHTS AND WHAT IT MEANS TODAY. *By Edward Dumbauld. Norman, Oklahoma: The University of Oklahoma Press. $3.75. Pages 242.*

About one hundred and sixty-six years have elapsed since the Bill of Rights was adopted as part of the Constitution of the United States. Few periods in United States history have gone by in which the Bill of Rights was invoked more frequently than it has been during the past two decades.

Mr. Dumbauld points out that "those provisions of the Bill of Rights which protect the inner life of citizens and the integrity of democratic political processes give rise to the greatest volume of activity by the Supreme Court".

He further discloses that the First Amendment and the Fifth have been "the most productive of controversy", and that in recent years the privilege against self-incrimination (Fifth Amendment) has often been invoked by persons being questioned by congressional committees investigating "subversive" activities. Currently we have noted that labor leaders under investigation by a Senate Committee for alleged racketeering have likewise remained "tight-lipped" and invoked the Fifth Amendment.

According to a Gallup poll released by the American Institute of Public Opinion on May 9, 1957, most Americans who are familiar with the Bill of Rights believe that a person is guilty when he pleads the Fifth Amendment.

About one quarter of the book is devoted to the historical background of the activities which finally resulted in the adoption in 1791 of the American Bill of Rights. About 50 per cent of the book is devoted to a discussion of the current judicial interpretation of the Bill of Rights covering such subjects as unused provisions, jury trial and its incidents, unreasonable searches and seizures, grand jury, double jeopardy, self-incrimination, due process of law, just compensation, First Amendment freedoms, the "clear and present danger" test, the doctrine of "preferred position", and finally, the application of the Bill of Rights against the states. The balance of the book contains the text of miscellaneous historical data such as the English Bill of Rights, various state proposals and proposed amendments.

There is a well-prepared index and a comprehensive bibliography. Many cases are cited to support the text, which is thoroughly documented.

The book is dedicated to the memory of Robert Houghwout Jackson, who spoke with "the authentic voice of freedom". This dedication prompts the reviewer to call attention to the following events.

In the summer of 1940, the Bill of Rights Committee of the American Bar Association embarked upon a new venture. It began the publication of a quarterly magazine called *The Bill of Rights Review*. The principal purpose was "to disseminate information generally concerning our constitutional liberties to the end that violations thereof may be the better recognized and proper steps taken to prevent or correct them".

Among the messages printed in the first issue of the *Review* was one from Robert H. Jackson, then Attorney General of the United States and later an Associate Justice of the Supreme Court of the United States. The opening sentence of his message declared: "Every failure of civil rights is at bottom a reflection on the legal profession."

Later in his message he stated: "Oppression of minorities, acts of intolerance and discrimination that are the more provocative because so petty, and tyranny with or without color of law, often flow from a local situation. Any federal intervention, even if appropriate, would be a temporary expedient. Permanent solution must be locally found and locally applied. In such a program the community Bar is the logical leader. Respect for civil rights, tolerance, the will to live and let live, the determination to see fair play is not mere doctrine of legal practitioners —it is the basic tenet of any democratic culture. It must be taught endlessly until it is as much a daily habit of thought with laymen as with lawyers."

Mr. Jackson's views, in the light of current events, seem prophetic.

Mr. Dumbauld's treatise is well timed and should be informative and useful both to laymen and lawyers.

NAT SCHMULOWITZ
San Francisco, California

THE DEFENSE ATTORNEY AND BASIC DEFENSE TACTICS. *By Welcome D. Pierson. Indianapolis: Bobbs-Merrill Co., Inc. 1956. $15.00. Pages 402.*

Mr. Pierson has written a book on trial tactics "for the trial lawyer, by a trial lawyer". He has appeared in hundreds of trials of cases and is, therefore, well qualified to write on the subject.

As he states in the preface to his work: "Many books have been written on trial tactics slanted toward the side of the plaintiff. It is the objective of this book to furnish helpful suggestions concerning some of the trial problems which arise in the defense of negligence actions." He very properly designates the position of the defense trial lawyer in negligence cases as the "hot side" of the table. At the very first part of his book he expresses the thought that no one who has ever represented the defense can deny that

"unflinching courage is a most important attribute of a defense trial attorney". It called to the mind of the writer of this review a conversation with the late Max P. Steuer, undoubtedly one of the greatest of American trial lawyers. The writer, then a young man, asked Mr. Steuer his opinion as to the greatest attribute of a trial lawyer. Mr. Steuer's answer came without hesitation, "courage". Mr. Pierson concludes that: "There are many qualifications which a defense attorney must possess, but if he does not have vigorous, forceful and robust courage, he had better leave the trial of cases to others."

The book is replete with suggestions regarding the preparation for trial and the trial of cases. It discusses the preparation and appraisement of the case and reaches the conclusion that although many a case has been overtried, not one has ever been overprepared. Mr. Pierson discusses discovery proceedings, discovery depositions, the propounding of interrogatories, demand for production and inspection, physical examination, the witnesses, admissions, testimony by deposition, the insurance problem and other subjects in which the trial lawyer is particularly interested.

An interesting view is presented in his discussion of the subject of pretrial proceedings. While the book maintains a favorable attitude toward such proceedings, Mr. Pierson is convinced that these proceedings should not be made the forum for compelling settlements, and he is somewhat critical of the attitude of those few judges who press too strongly for settlement at pretrial. In this connection he approves the language of a Wisconsin judge to the effect that litigants as well as counsel often resent what they regard as unjustified interference by the court with their legal rights. He discusses the psychology of settlement negotiations, the right time for making a settlement, and the determination of the amount to be paid.

The chapter on witnesses is particularly interesting and informing. It covers the initial interview of the witness, the first impression the attorney makes on the witness, the calibre of witnesses (whether average, dogmatic, timid, hostile), advice as to deportment on the witness stand, and the necessity of keeping in touch with the witness until the case is tried. The matter of the examination of expert witnesses is considered, as are the factors governing their selection.

The book contains references to court decisions and standard authorities, and is documented by over eight hundred footnotes and more than two thousand court decisions and legal authorities, covering practice and procedure in both the federal and state courts.

All in all, the book will be a valuable addition to the library of the trial lawyer. It provides helpful suggestions for the defense attorney; and the plaintiff attorney will find it of interest in order that he may know the strategy of defense!

WALTER M. BASTIAN
United States Court of Appeals
for the District of Columbia Circuit

FRACTURES, DISLOCATIONS AND SPRAINS. SIXTH EDITION.

By Dr. John Albert Key and Dr. H. Earle Conwell. St. Louis, Missouri: The C. V. Mosby Company. 1956. $20.00. Pages 1168.

The trial lawyer in general practice who does not specialize in personal injury cases has learned to depend a great deal on the textbooks written to the level of the doctor in general practice for the attorney's helpful background on medical matters encountered in trial. In such matters as broken bones, dislocated joints or sprains, or even strains of musculature and other non-skeletal, anatomical parts, it is important to both the prosecutor and the defender to have at hand a complete, concise, well-indexed, well-illustrated, reputable and recognized text. In most respects the sixth edition of Key and Conwell fulfills these demands, and admirably.

The sixth edition contains a great many thorough revisions and additions, particularly in the chapters concerning injuries to the spine and in the region of the hip. This brings to the lawyer preparing his client's case the learning that the noted authors primarily intend to impart to the general medical practitioner who is not an expert in these fields, but needs the guidance of those who have much more experience and facilities for examination and experiment.

It is to be regretted that two of the chapters from earlier editions concerning fractures of the skull, brain trauma, and fractures of the jaw and other facial bones, have been omitted. The authors, in their preface to the sixth edition, indicate that this deletion was because the care of such injuries has become highly specialized today. It is to be regretted that one buying the sixth edition does not have at least the learning from previous editions available for general background material and indoctrination about these matters before delving into the specific and more technical papers of specialists in preparation for trial of head injury cases.

The illustrations, both pictorial, roentgenogram reproduction and diagrams, are especially helpful in following the lucid, well-written and patterned text of each of the chapters on the specific regions of the body. The usual pattern followed is to first explain surgical anatomy, followed usually by other pathological considerations involved, then, in some instances, the method of examination to make a preliminary determination of the apparent injury. Then appears a description of the injury and the diagnosis thereof, followed by the treatment, and in most instances a usual prognosis is given. This affords a general over-all picture of the things that a lawyer who is not a medical man himself should know before tackling either the attending physician or the specialist on the witness stand, or, perchance, further study in the more intricate and specialized medical texts and

journals concerning the specific problem involved.

The book is well printed, well indexed and well bound.

Either to supplement the earlier editions, which covered a little broader field, but do not contain as many illustrations or information on new techniques, or by itself, the sixth edition of Key and Conwell is a valuable addition to the library of any lawyer who has need for ready, complete, dependable and understandable guidance in its field.

OSMER C. FITTS

Brattleboro, Vermont

UNIFORMITARIAN PROCESS UNDER SUPREME LAW. *By Ruby R. Vale. Palo Alto, California: C. W. Taylor, Jr. 1956. $4.00. Pages xvi, 1488-1771.*

The well-known editor of Vale's Pennsylvania Digest has completed the sixth and final volume of a monumental series under the heading "Some Legal Foundations of Society", with the express purpose of advancing justice in human affairs. The earlier volumes, beginning in 1941, are *Understanding; Purpose; Conciliation; Justice Under Law and for Humanitarianism;* and *Justice, Science and Religion.* The pagination continues in sequence throughout the series ending with page 1771, the current volume having a total of 283 pages. Volumes five and six have, in addition to individual indexes, cumulative indexes with references to previous volumes so that from the page number given, reference can be made quickly to the pertinent subject in any volume.

This last volume contains forty-seven chapters under eight general headings as follows: "Man and His Cosmos"; "Universal Energy and Uniformitarian Process"; "Uniformitarian Process and Universal Change"; "Uniformitarian Process and Levels of Change"; "Uniformitarian Process and Vital Activities"; "Uniformitarian Process and Human Interests as Motivations"; "Uniformitarian Process and Institutional Interests as Satisfactions"; "Supreme Law and Uniformitarian Process as Humanism". The author notes the historical and scientific changes that have taken place since the series was begun, but finds no great change in his earlier concepts, many of which are herein repeated. The fundamental concepts are based on hypotheses probably unrecognized by scientists but which from a philosophical point of view appear reasonable. Those who may not agree entirely with the author will find at least much food for stimulating thought in his logic. Starting from the cosmos rather than from any one phase of it, the author synthesises the major sciences, relates them to man—his mind, his self—adds purpose and fitness, and from the whole postulates the theory of a uniform process pattern applicable to all cosmic energy. Positing that original cause is unknowable, he believes the hypothetical continuing, uniform, cosmic, dynamic and eternal purposive and creative process which he expounds can explain universal patterns that move every variant manifestation of energy to the ultimates of fitness and balance in every structure, both life and lifeless, and of goodness and justice in all aspirations of the human mind and the relations of man. The findings of physical, chemical and medical research have demonstrated the uniformity of electrical phenomena in all organisms. The author infers from this a similarity in the manner of change of all forces. He suggests a coalescence of the laws of nature and of man, stemming from the same evolutionary process.

The nature of the human mental process is discussed. Admittedly, the evaluation of reasonability depends on the minds that record and appraise the observations and give them meaning. Thus qualified, he synthesises mind with physical, psychical and moral forces, recognizing the gradual evolvement of man and the subjugation of his animal nature through experience and by the restraints of government, but which evolvement, due to unlike concepts of self and diverse experiences, has developed different ways of life in the cultures of the East and the West. These he feels can and must be reconciled.

As is apparent from the subject headings given above, the postulated uniformitarian process is related to diverse subjects throughout the book, being universal in its scope. This procedure extends to mind, thinking, meaning and understanding. The resultant hypothesis is that back of all evolution lies a universal compulsion to purposive action, else the necessary conclusion that all progress is fortuitous and individual freedom an illusion. There follows the relating of uniformitarian process to human behavior and thence to government, religion, economics and aspirations for justice. Mr. Vale holds the supreme goals of individual worth to be:

> That freedom of choice be denied to none and so preserved for all, and that every person be let alone in realization of the personal self—not in anarchic isolation, but for the profit of every worthy effort and good for all. The end of all strivings is the attainment of a calm attitude of mind that seeks justice and liberty and respects repose, searches for clear understandings and evokes the choice of right purposes. It imposes the restraint of tolerance on conflicts and inculcates the duty of fitness in thought and of justice in ideals of action, which aspire for realization in idea and achievement. Thus, the miracle sequel of dreams made real is exemplified in spiral ascending experience.

In this volume, and indeed throughout the series, the author dwells on the necessity for the equitable distribution of profits as well as diffusion ownership in the financing of industry. "The equitable distribution of profits becomes then the keystone in the whole structure of economy, for without profits there can be neither production nor continuity of consumption, a market for use or exchange."

With a warning of the power of the uranium and hydrogen bombs, possibly implying that the forces of creation and catastrophe are similar, the hope is indulged that science will find among the fields of energy

a solution of the transmutation of lifeless to vital forces. A theory of a uniformitarian process involving the fundamental and the similar would simplify the procedure.

It is impossible within the scope of this review to give more than a glimpse of the profundity of this volume, which in fact extends throughout the entire series. Definitely it is not for the hasty or superficial reader. The philosopher or the metaphysician who is interested in universals will find Mr. Vale's hypotheses and conclusions full of substance and challenge. The concept of a universal cosmic process might well give the scientist a valuable clue in his search for a key that will open wider the vistas of the cosmos. Science and philosophy will be closer together as each comes closer to reality.

JOHN BIGGS, JR.
United States Court of Appeals
for the Third Circuit

INTERNATIONAL GOVERNMENTAL ORGANIZATIONS: CONSTITUTIONAL DOCUMENTS. *Edited by Amos J. Peaslee. The Hague: Martinus Nijhoff. 1956. New York: Justice House, 501 Fifth Avenue. $15 or 57 guilders. Two volumes, cloth bound.*

These are companion volumes compiled and published by the editor of *Constitutions of Nations.* The English version or translation of the constitutional or basic documents of some 108 international organizations created by governments under multilateral agreements are included. Organizations set up under bilateral agreements and many unofficial international organizations are not included. Alphabetically arranged, the contents begin with the African Postal Union and end with the World Meteorological Organization. In between are the official documents relating to many well-known international institutions such as the Bank for International Settlements, the Council of Europe, the European Coal and Steel Community, the Food and Agriculture Organization, the International Court of Justice, the International Labor Organization, the Unions for the Protection of Industrial Property and Literary and Artistic Works, the League of Arab States, the North Atlantic Treaty Organization, the Organization of American States, the United Nations, the Universal Postal Union and World Health Organization. The texts of the documents are preceded by a general summary prepared by the editor. An index facilitates access to the contents of the documents.

As in the case of the preceding volumes, Mr. Peaslee undertook this compilation "upon the assumption that the process of organizing governmental institutions, both national and international, is likely to be of major interest for some years yet to come—aye, unto eternity."

GEORGE A. FINCH
Washington, D. C.

FEDERAL ESTATE AND GIFT TAXES. *By Charles L. B. Lowndes and Robert Kramer. Englewood Cliffs, New Jersey: Prentice-Hall, Inc. 1956. $25.00. Pages xxii, 1028.*

Practicing attorneys need not be reminded of the increasing impact of federal gift and estate taxes upon their clients. Publication in 1942 of Randolph Paul's excellent *Federal Estate and Gift Taxation* made available to the profession a valuable treatise. But there have been far-reaching and significant developments in this area in the eleven years which have elapsed since publication of the last supplement. In the past decade many a non-specialist has searched in vain for a handy up-to-date reference text for orientation purposes. This new text by Professors Lowndes and Kramer of Duke University Law School would appear to fill this very real need. Actually, *Federal Estate and Gift Taxes* is broader than its title indicates. Parts I and II, occupying the first 825 pages, comprise a readable annotated treatment of the estate tax and the gift tax. Part III entitled "Tax Planning for Estates" is a necessarily summary treatment approached primarily in terms of federal gift and estate tax planning.

By the nature of its subject matter, this book cannot be of equal value to all attorneys; it was not intended to be. It will be recognized that no bound volume, however excellent, will substitute for the current tax services and research on a particular problem. As must be true of any work on taxation, the current volume, published prior to the release of the new estate and gift tax regulations, is already at least partially out-dated; each day carries the possibility that new judicial decisions and administrative rulings will further modify the textual discussion.

But if bound volumes have their limitations in the tax area, some have also served the profession well. The tax specialist will acknowledge the continuing usefulness of the wise insights preserved in outstanding essays on taxation such as Magill's *Taxable Income,* Simons' *Federal Tax Reform* and the late Randolph Paul's series of *Studies in Federal Taxation.* Parts I and II of the Lowndes and Kramer book should also perform a significant service, though in a different way.

For the newcomer to the field, study of Parts I and II furnishes an admirable over-all introduction. The writers seem to assume an uninitiated reader and facilitate an understanding of tax consequences by first lucidly explaining terms and devices with which the reader may not be wholly familiar—such as the nature and forms of annuities and the operation of so-called retirement and refund annuities. Examples have been used liberally to aid the beginner to visualize the problem as well as the tax result. More important, this is no sterile collation of black-letter pronouncements and excerpts from cases. The authors do not hesitate to editorially explore the problem areas in which clear answers appear to be lacking, and to indulge in criticism. The reader is treated to the benefit of the authors' study and speculation, and occasionally to a burst of outraged eloquence, as exemplified by the

passage at page 692, "a complete subordination of substance to form in direct contravention to the shibboleth in which the courts take such pride that taxation is an eminently practical matter which is governed by substance rather than form".

The practitioner who occasionally treads this ground may find assistance of several sorts. The detailed Table of Contents and an extensive index furnish an entree to a usually concise and well-written orientation. A further point of departure is furnished by case references in the numerous footnotes, but a more liberal inclusion of citations to the current law review materials might have increased the book's utility. Conceding that this is but a waystation, preparatory to further reference to the current services and law reviews, many practitioners may find this gradual immersion vastly superior to a sudden plunge into an unfamiliar area. In addition, the authors perform a signal service, even if it be mnemonic, in frequently calling attention to areas in which lack of correlation between the income, estate and gift taxes exists. It may be hoped that this will prove unnecessary in future editions, but constant awareness of this existing hiatus will be of importance until the American Law Institute, or some similar moving force is successful in triggering revision of the Internal Revenue Code to create some semblance of symmetry.

The specialist in federal taxation may find less cause for enthusiasm for this book. The tax sophisticate may even suggest that the editorial content does not achieve the depth of a Paul or Eisenstein effort, may grouse at areas which seem unduly labored, may feel others are not treated in sufficient depth, and that still others, such as the annuity problems, are not sufficiently illuminated by adequate editorial revelation. To this Professors Lowndes and Kramer may well reply that, as the preface states, the book, apart from the possibility that the experienced practitioner may find useful "a compact text to refresh his recollection", is directed to "the general practitioner who is not a tax specialist . . . [and to] the student beginning his studies." Perhaps value judgments as to the scope of treatment accorded are more understandable from that viewpoint.

If criticism be a necessary hallmark of a review, perhaps it is best directed toward Part III—"Tax Planning for Estates". In contrast to the earlier Paul treatise which was content to treat extensively of the federal estate and gift taxes (a worthy and exhaustive task in itself), Professors Lowndes and Kramer have courageously attempted to present introductory materials to the taxation aspect of estate planning in a brief 143 pages. Primary attention has been given to planning in terms of gift and estate taxes, cross-referenced to discussions in the preceding parts of the book, with only incidental consideration of the income tax. In the book's final twenty-seven page chapter, titled "Income Tax Considerations", the authors frankly acknowledge that income tax consequences are at least as worthy of consideration in tax planning as are succession tax results and, following a brief apologia for the necessarily curtailed treatment, attempt "an exposition of the general principles of income tax planning". It may be suggested that, however well done, it would be difficult for an orientation so limited to bridge the hiatus. Yet, even if the "Tax Planning" section contained adequate treatment of both income and succession taxes in the depth characteristic of the first two parts of the book, inclusion of Part III in this volume might be questioned. Estate Planning is at best a complex and tricky business. Tax planning may, and usually should, play an important role here. But the experienced estate planner attaches primary importance to the implementation of a wise and effective disposition of assets and utilizes tax planning to secure tax minimization within the pattern of the general scheme. The authors recognize that the desire to "save" taxes may lead to inordinate emphasis upon tax planning and wisely post a warning for the reader. Nevertheless, an argument can be made in favor of treating tax planning as a part of the general framework of estate planning, thus permitting joint consideration of the tax and non-tax aspects of property dispositions—with less danger of a preoccupation with taxation, such as might be engendered by separate treatment at the end of a volume devoted to taxation.

Inclusion of the "tax planning" part obviously does not impair the value of this book. The lawyer will undoubtedly find much of value in Part III, but in "planning" he would do well to keep in mind that this is tax-oriented and must be meshed with other important non-tax considerations.

It may be ventured that this book will not become a one-volume substitute for the specialist's library but as both an excellent "handy reference" and as an introductory text and reference guide to federal estate and gift taxation, it furnishes a valuable addition to the professional literature—one which the general practitioner should find well worth the investment.

ALAN N. POLASKY

Northwestern University
Chicago, Illinois

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Aeronautical law . . . *subpoena duces tecum*

Civil Aeronautics Board v. *Hermann*, 353 U. S. 322, 1 L. ed. 2d 852, 77 S. Ct. 804, 25 U. S. Law Week 4300. (No. 540, decided May 6, 1957.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Reversed and remanded.*

This was a suit to enforce an order of the Civil Aeronautics Board against the respondents, a group operating the "Skycoach" air travel system. The Board's complaint charged violations of its regulations and of the Civil Aeronautics Act and sought certain revocation and cease and desist orders against respondents. In the course of the hearings before the Hearing Examiner and the Board, a number of subpoenas *duces tecum* were issued, which the respondents contended were vague, excessively broad in scope and oppressive. The Board overruled this contention and filed this enforcement proceeding to compel the respondent to honor the subpoenas. The District Court continued the case for ten days to give respondents a chance to produce the documents sought, and, upon expiration of that period, entered an order of enforcement, allowing time between dates for production of the documents so that the respondents would not be deprived of all their books at once. The Court of Appeals reversed, establishing certain procedural requirements for the Board to follow.

In a *per curiam* opinion, the Supreme Court reversed and remanded for a reinstitution of the District Court's enforcement order. The Court declared that the District Court "duly enforced the Board's right to call for documents, relevant to the issues of the Board's complaint, with appropriate provisions for assuring the minimum interference with the conduct of the business of respondents."

The case was argued by Solicitor General J. Lee Rankin for the petitioner and by Roland E. Ginsburg for the respondents.

Aliens . . . *supervision*

United States v. *Witkovich*, 353 U. S. 194, 1 L. ed. 2d 765, 77 S. Ct. 779, 25 U. S. Law Week 4266. (No. 295, decided April 29, 1957.) *On appeal from the United States District Court for the Northern District of Illinois. Affirmed.*

The appellee in this case was indicted under Section 242 (d) of the Immigration and Nationality Act of 1952 for wilful failure to give information to the Immigration and Naturalization Service as required by the statute. That section provides that any alien against whom a final order of deportation has been pending for more than six months shall be subject to supervision under regulations promulgated by the Attorney General. The appellee refused to answer questions as to his associates and activities, and this refusal led to his indictment. Holding that the statute was not unconstitutional, the District Court answered a Government motion for clarification of its opinion by dismissing the indictment for failure to state an offense.

On direct appeal to the Supreme Court, Mr. Justice FRANKFURTER affirmed, speaking for the Court. The Court agreed with the District Court's construction of the statute which limited the scope of the Attorney General's supervision. The District Court read the statute as giving the Attorney General power to require "only such information as is necessary to enable the Attorney General to be certain that the alien is holding himself in readiness to answer the call to be deported when it comes". The Supreme Court agreed, saying that, although the language of the statute, if read literally, appeared to confer upon the Attorney General unbounded authority to require whatever information he desired, the section dealt with certainty of availability for deportation, and that was what Congress had been concerned with. A broader construction, the Court said, "would raise doubts as to the statute's validity".

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice CLARK, joined by Mr. Justice BURTON, dissented, arguing that Congress had been concerned with the danger that undesirable aliens presented to the country and accordingly had intended to give the Attorney General very broad powers of supervision over them. The dissent saw no constitutional problem, especially in view of the wide power that Congress has over aliens.

The case was argued by John F. Davis for appellant and by Pearl M. Hart for appellee.

Evidence . . . *illegal search and seizure*

Kremen v. *United States*, 353 U. S. —, 1 L. ed. 2d 876, 77 S. Ct. 828, 25 U. S. Law Week 4309. (No. 162, decided May 13, 1957). *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Reversed.*

Here the Court overturned verdicts against the petitioners because some of the evidence on which the verdicts were based had been obtained by an illegal search and seizure by agents of the Federal Bureau of Investigation.

Reviews in this issue by Rowland Young.

The indictment charged the petitioners with relieving, comforting, and assisting one Thompson, who was a fugitive from justice, in violation of 18 U.S.C. §3, and with conspiring to commit that offense in violation of 18 U.S.C. §371. In addition, two of the petitioners were charged with harboring Steinberg, another fugitive from justice, and with conspiring to commit that offense. Petitioners were found guilty and their convictions were sustained, one judge dissenting.

The petitioners were arrested in a cabin in a secluded village in California. The F.B.I. agents making the arrests had warrants for the two fugitives but not for the other petitioners. A thorough search of the cabin was made and its entire contents seized. The agents had no search warrant.

The Supreme Court reversed the convictions in a brief *per curiam* opinion. The Court declared that "The seizure of the entire contents of the house and its removal some two hundred miles away to the F.B.I. offices for the purpose of examination is beyond the sanction of any of our cases". The Court attached to its opinion an inventory of the property seized, by way of showing the extent of the search and seizure. The list consisted largely of miscellaneous items of clothing, athletic goods, and personal effects including such small objects as "1 shoelace", "1 bar Palmolive soap", "1 flashlight bulb".

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice BURTON and Mr. Justice CLARK dissented on the ground that the items were legally seized. Validity of the seizure did not depend upon the quantity of items seized, they stated, but upon the circumstances of the seizure as to each of the items that was offered in evidence.

The case was argued by Norman Leonard for the petitioners and by Kevin T. Maroney for respondent.

Labor law . . . *foreign seamen*

Benz v. *Compania Naviera Hidalgo*, 353 U. S. 138, 1 L. ed. 2d 709, 77 S. Ct. 699, 25 U. S. Law Week 4235. (No. 204, decided April 8, 1957). *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit.*

The holding in this case was that the Labor Management Relations Act does not apply in a controversy involving damages resulting from the picketing of a foreign ship operated by foreign seamen while the vessel is temporarily in an American port.

The *S. S. Riviera* sailed into harbor at Portland, Oregon, for repairs, to load a cargo and to complete an insurance survey. Owned by a Panamanian corporation, the vessel sailed under the Liberian flag and was manned by a crew composed entirely of foreigners, largely German and British. While the ship was in the harbor, the crew went on strike for a shorter term of service, for increased wages and for more favorable conditions of employment. The master discharged them, and the crew finally left the vessel pursuant to an order of a federal district court. During the next two months, picket lines were set up by three American unions representing the disgruntled crew and were dissolved by three separate court orders. The orders were appealed, but the appeals were dismissed by the Court of Appeals as moot since the ship had sailed. The Court of Appeals returned the case to the District Court for trial on the claims for damages which resulted when employees of firms repairing and loading the vessel refused to cross the picket lines and the ship was forced to stand idle without repairs or cargo. The trial court found for the respondents and entered judgment for damages, based on the common-law theory that the picketing was for an unlawful purpose under Oregon law. The court found that the Labor Management Relations Act did not apply. The Court of Appeals thought that the case was governed by *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656 (1954), but that Oregon law did not permit recovery against the unions because they were unincorporated associations. This had the effect of leaving the judgments standing against the individual representatives of the unions, who were the petitioners before the Supreme Court.

Mr. Justice CLARK delivered the opinion of the Court affirming. The Court reasoned that the Labor Management Relations Act was concerned with industrial strife between American employers and employees and was not intended to apply to labor disputes between foreigners operating ships under foreign laws. The whole legislative history of the Act supported this view, the Court declared.

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice DOUGLAS wrote a dissenting opinion which argued that the facts indicated either a violation of Section 303 (a) (1) or 303 (a) (2) of the Act and, in either case, the injured person could sue in the federal courts. "American unions . . . have a vital interest in the working conditions and wages of the seamen aboard this foreign vessel. Their interest is in the re-employment of the foreign crew at better wages and working conditions" the dissent argued.

The case was argued by Kneland C. Tanner for petitioners and by John D. Mosser for the respondent.

Labor law . . . *state action*

Government and Civic Employees Organizing Committee v. *Windsor*, 353 U. S. —, 1 L. ed. 2d 894, 77 S. Ct. 838, 25 U. S. Law Week 4315. (No. 423, decided May 13, 1957.) *On appeal from the United States District Court for the Northern District of Alabama. Judgment vacated and cause remanded.*

An Alabama statute provides that any public employee who joins a labor union forfeits the "rights, benefits, or privileges which he enjoys as a result of his public employment". The appellants began an action in the federal District Court to

enjoin enforcement of this statute on the ground that it abridged the freedoms of expression and association and was a violation of the due process, privileges and immunities and equal protection clauses of the Fourteenth Amendment. The District Court withheld exercise of its jurisdiction and retained the cause pending exhaustion of state administrative and judicial remedies. This judgment was affirmed by the federal Supreme Court.

The union then began an action in the state courts, asking for an injunction and for a declaratory judgment that appellant was not a labor union within the meaning of the statute. None of the constitutional questions were presented. The state court held that the statute applied to the appellants and the Alabama Supreme Court affirmed. Again the appellants went to the federal District Court, which dismissed their action with prejudice, holding that the Alabama courts had not construed the statute in such a manner as to render it unconstitutional.

In a *per curiam* opinion, the Supreme Court vacated this judgment and remanded the cause to the District Court with directions to retain jurisdiction until efforts to obtain an appropriate adjudication in the state courts have been exhausted. The Court noted that the bare adjudication by the Alabama courts that the union was subject to the act did not suffice, since the state court had not been asked to interpret the statute in the light of the constitutional objections. "If appellants' freedom of expression and equal protection arguments had been presented to the state court, it might have construed the statute in a different manner" the Court said.

Mr. Justice BLACK took no part in the consideration or decision of the case.

The case was argued by Milton I. Shadur for appellants and by Gordon Madison for the appellees.

Labor law . . .
unions as employers

Office Employes International Union v. *National Labor Relations Board*, 353 U. S. 313, 1 L. ed. 2d 846, 77 S. Ct. 799, 25 U. S. Law Week 4273. (No. 422, decided May 6, 1957.) *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Reversed and remanded.*

As a result of this decision, the Teamsters Union finds itself wearing the shoes of management in a labor controversy. The question in the case, which the Court decided in the affirmative, was whether, with respect to their own employees, labor unions are "employers" within the meaning of the Labor Management Relations Act. The Court also held that the National Labor Relations Board could not, in the exercise of its discretion, refuse to assert jurisdiction in the case.

The Office Employes Union filed a series of unfair labor practice complaints against the various Teamster unions housed in the Teamsters Building in Portland, Oregon. The substance of the complaints was that the Teamster group had interfered with the Office Employes union's attempts to organize the twenty-three office-clerical workers in the building. The N.L.R.B. refused to assert jurisdiction and dismissed the complaints. The Court of Appeals affirmed.

Mr. Justice CLARK delivered the opinion of the Supreme Court reversing and remanding. The Court declared that the statute is "clear and unambiguous" and specifically states that the term "employer" includes any labor organization "when acting as an employer". In holding that it was not within the Board's discretion to remove unions as employers from the coverage of the act, the Court noted that the Board has declined jurisdiction on an *ad hoc* basis over religious, educational and eleemosynary employers. Here, however, the declination of jurisdiction was "an arbitrary blanket exclusion of union employers" which was contrary to the intent of Congress.

Mr. Justice BRENNAN, joined by Mr. Justice FRANKFURTER, Mr. Justice BURTON and Mr. Justice HARLAN, wrote a brief opinion concurring in the Court's holding that labor organizations are "employers" under Section 2 (2) but dissenting from the holding that the Board was without power to decline to assert jurisdiction over labor unions as employers.

The case was argued by Joseph E. Finley for the petitioner and by Dominick L. Manoli for the Board.

Lawyers . . .
admission to the Bar

Schware v. *Board of Bar Examiners*, 353 U. S. 232, 1 L. ed. 2d 795, 77 S. Ct. 752, 25 U. S. Law Week 4276. (No. 92, decided May 6, 1957.) *On writ of certiorari to the Supreme Court of New Mexico. Reversed and remanded.*

Like the *Konigsberg* case, *infra*, the problem here was the denial of a license to practice law because of a suspected Communist background on the part of the applicant.

Schware was a student at the University of New Mexico School of Law who applied for permission to take the New Mexico bar examination scheduled for February, 1954. The application required detailed answers to a number of questions, and his replies revealed that he had used aliases on occasions between 1933 and 1937 and that he had been arrested on several occasions before 1940. The Board of Bar Examiners denied him permission to take the examination, apparently relying upon confidential information that Schware had been a member of the Communist Party. The applicant requested a formal hearing during which his entire background was thoroughly explored. The Board reaffirmed its decision and the New Mexico Supreme Court upheld the denial of permission to take the examination, one justice dissenting.

Mr. Justice BLACK, speaking for the Supreme Court, reversed and remanded. The Court examined the facts of the case in detail, noting that Schware's use of aliases had been to escape the effects of anti-Semitic prejudices in securing em-

ployment and in working in the labor union movement. While he was arrested during the 1934 maritime strikes on the West Coast, he was never formally charged nor tried. His second arrest had been in 1940 for violating the Neutrality Act of 1816, when he had tried to recruit men for duty on the side of the Loyalist Government during the Spanish Civil War. Schware admitted that he had been a member of the Communist Party, but he quit the Party in 1940 after being disillusioned by the Nazi-Soviet Non-Aggression Pact of 1939. Against this record, the Court balanced Schware's service as a paratrooper during World War II and wartime letters written to his wife showing a desire to serve his country and demonstrating faith in a free democratic society, as well as the fact that since the war his conduct has been exemplary. The rabbi of his synagogue, a local lawyer, and the secretary to the dean of the law school testified as to Schware's good character, and letters in his favor were introduced from every member of his law school class and from every member but one of the faculty of the law school. The Court declared that nothing in the record showed any moral turpitude on the part of the applicant, since even with respect to his Communist Party membership, there was no showing that he had participated in any illegal activity or done anything morally reprehensible. Many young men joined the Party during the Great Depression, the Court pointed out, and it was a legal political party at that time. The Court held that all this added up to a showing of good moral character and the denial of his request to take the bar examination amounted to a deprivation of due process.

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER, joined by Mr. Justice CLARK and Mr. Justice HARLAN, wrote a concurring opinion which stressed the fact that the New Mexico Supreme Court had attached too much significance to the applicant's pre-1940 membership in the Communist Party.

The case was argued by Herbert Monte Levy for the petitioner and by William A. Sloan and Fred M. Standley for the respondent.

Lawyers . . .
admission to the Bar

Konigsberg v. *State Bar of California,* 353 U. S. 252, 1 L. ed. 2d 810, 77 S. Ct. 722, 25 U. S. Law Week 4281. (No. 5, decided May 6, 1957.) *On writ of certiorari to the Supreme Court of California. Reversed and remanded.*

This case, like its companion, *Schware* v. *United States, supra,* dealt with an applicant's right to be admitted to the Bar in spite of adverse findings by the bar examiners as to his "good moral character". As in the *Schware* case, the applicant was suspected of having a background of Communist Party membership.

Konigsberg was graduated from the Law School of the University of Southern California in 1953 and successfully passed the California bar examination. Nevertheless, the State Committee of Bar Examiners refused to approve his application on the grounds that he had failed to prove (1) that he was of good moral character and (2) that he did not advocate overthrow of the Government by unconstitutional means. Konigsberg asked the California Supreme Court to review the committee's decision, contending that the committee's action deprived him of rights secured by the Fourteenth Amendment. The California court denied his petition for review without opinion and with three of its seven justices dissenting.

The opinion of the United States Supreme Court, reversing and remanding, was delivered by Mr. Justice BLACK. At the threshold of the controversy, the Court was faced with the state's contention that it was without jurisdiction because Konigsberg had not presented his constitutional claims in accordance with the rules of the California Court and that that court's denial of his petition rested on his failure to conform to its procedural rules. The rules require an argument and citation of authorities in a brief submitted by the person seeking review. The Supreme Court said that the state supreme court had examined the entire record of the hearings before the committee and must therefore have been aware of the applicant's constitutional arguments. Moreover, this was not an appeal of an ordinary civil case, but rather was an original proceeding, the Court said, and there was nothing in the California rules which require that contentions raised in the petition in such a case must be set out in the brief.

The Court then turned to the constitutional questions. During several hearings before the committee, Konigsberg had been questioned at length about his political affiliations and beliefs. He had refused to answer, arguing that this line of interrogation intruded into areas protected by the Constitution and that California law did not require him to divulge his political associations in order to qualify for the Bar. The committee's holding that he had not proved his "good moral character", the Court said, had been made in spite of testimonials from forty-two persons who knew the applicant, including a Catholic priest, a Jewish rabbi, lawyers, doctors, professors, businessmen and social workers, and in spite of an excellent record. The Court said that the evidence tending to indicate Communist leanings—the testimony of one ex-Communist that Konigsberg had attended meetings of a Communist Party unit in 1941, his criticism of certain public officials and their policies expressed in editorials written for a local newspaper, and his refusal to answer certain questions about his political associations—were not sufficient to justify a finding that he had failed to show a good moral character or that he advocated overthrow of the Government by unlawful means.

Mr. Justice WHITTAKER took no part in the consideration or decision

of the case.

Mr. Justice FRANKFURTER wrote a dissenting opinion which urged remand of the case to the Supreme Court of California for its certification whether or not it did in fact pass on a claim properly before it under the Fourteenth Amendment.

Mr. Justice HARLAN, joined by Mr. Justice CLARK, wrote a strong dissent which contained considerable quotation from the record of the hearings before the examining committee. The dissent took the position that the committee was under a statutory duty to inquire as to the applicant's qualifications and his refusal to answer questions in order to dispel the committee's doubts prevented the committee from discharging its responsibilities.

The case was argued by Edward Mosk for the petitioner and by Frank B. Belcher for the respondents.

Patents . . .
venue

Fourco Glass Company v *Transmirra Products Corporation*, 353 U. S. 222, 1 L. ed. 2d 786, 77 S. Ct. 787, 25 U. S. Law Week 4261. (No. 310, decided April 29, 1957.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Reversed and remanded.*

The question presented here was whether Section 1400(b) of 28 U.S.C. is the sole and exclusive provision governing venue in patent infringement actions or whether such actions are also subject to the general venue provisions of Section 1391 (c) of 28 U.S.C.

The petitioner was sued for patent infringement in the Southern District of New York and moved to dismiss on the ground that, although it had a regularly established place of business in that district, there was no showing that any of the alleged acts of infringement had been committed there, a showing required by Section 1400 (b). The District Court held that Section 1400 (b) was the exclusive provision governing patent infringement suits and dismissed the action. The Court of Appeals reversed, holding that a proper construction of the two statutes required a treatment by which Section 1391 (c) was considered as supplementing Section 1400 (b).

The Supreme Court reversed and remanded in an opinion by Mr. Justice WHITTAKER, his first for the Court. The Court rested its decision on *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561, which had held that Section 48 of the Judicial Code, the predecessor of Section 1400 (b) was the sole provision governing venue in patent infringement cases. The soundness of the *Stonite* decision was not in question, the Court pointed out, and, after a review of the legislative history of the re-enactments of both the patent venue provisions and the general venue provisions in the 1948 revision and recodification of the Judicial Code, it concluded that Congress had not intended to alter the effect of the earlier provisions. The Court said that Section 1391(c) is a general corporation venue statute, whereas Section 1400 (b) is a special venue statute applicable specifically "to *all* defendants in a particular type of actions, *i. e.*, patent infringement actions" (italics are the Court's).

Mr. Justice HARLAN dissented for the reasons given by the Court of Appeals.

The case was argued by Edward S. Irons for the petitioner and by W. R. Hulbert for respondents.

Railroads . . .
right of way

United States v. *Union Pacific Railroad*, 353 U. S. 112, 1 L. ed. 2d 693, 77 S. Ct. 685, 25 U. S. Law Week 4239. (No. 97, decided April 8, 1957.) *On writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Reversed.*

This was an action brought by the United States to enjoin the Union Pacific Railroad from drilling for oil and gas on the right of way granted to it by Section 2 of the Act of July 1, 1862, 12 Stat. 489, 491. for the construction of a railroad and a telegraph line. The Government contended that the "right of way" conveyed by the act was not a grant of mineral rights. The District Court decided otherwise and the Court of Appeals affirmed.

The opinion of the Supreme Court reversing was delivered by Mr. Justice DOUGLAS. The Court relied upon Section 3 of the Act of 1862 which provided that "all mineral lands shall be excepted from the operation *of this act* . . . " (italics are the Court's). This, the Court suggests, may have been an inept way of reserving the mineral rights, and, in any event, the exception of "mineral lands" extends to the entire act, not merely to Sections 9, 13 and 14 as contended by the railroad. The Court agreed that Congress might have used better draftsmanship to except the mineral rights from its grant, but said that its interpretation was in keeping with the policy of the times when the gold strike in California had made the entire country conscious of the potential riches of mineral deposits.

The railroad had placed great reliance on a line of cases, particularly *Great Northern Railroad* v. *United States*, 315 U. S. 262, which had referred to a railroad right of way as a "limited fee", but the Court replied that most of these cases were controversies between the railroads and third parties, not between the railroads and the Government, and moreover none of those cases involved the question of mineral rights. "The most that the 'limited fee' cases decided was that the railroads received all surface rights to the right of way and all rights incident to a use for railroad purposes" the Court declared.

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER wrote a dissenting opinion in which Mr. Justice BURTON and Mr. Justice HARLAN joined. The dissent delved extensively into the history of the 1862 act and arrived at a much different view of the legal interests embraced

in the grant of the "right of way". The right of way, according to the dissent, was a fee simple determinable, subject only to a reverter in the event that the right of way ceased to be used for railroad purposes. The grant of such an extensive interest to the railroads was a deliberate congressional policy of "liberality, prodigality" in order to encourage the construction of railroads which, in 1862, were deemed vital for the opening of the West to settlement.

The case was argued by Solicitor General J. Lee Rankin for petitioner and by William W. Clary for the respondent.

Railroads . . . *Employers' Liability Act*

Arnold v. *Panhandle and Santa Fe Railway*, 353 U. S. — , 1 L. ed. 2d 889, 77 S. Ct. 840, 25 U. S. Law Week 4314. (No. 240, decided May 13, 1957.) *On writ of certiorari to the Supreme Court of Texas and the Court of Civil Appeals of Texas, Seventh Supreme Judicial District. Reversed and remanded.*

In this brief *per curiam* opinion, the Court reversed and remanded a Texas court's judgment overruling the jury's verdict in favor of the petitioner in a Federal Employers' Liability Act case. The Court took the position that the jury's general verdict, finding that the respondent negligently contributed to the petitioner's injury, had enough support in the testimony of witnesses to serve as a basis for the conclusion that the employer's negligence played a part in producing the injury.

Mr. Justice FRANKFURTER dissented, saying that he would have dismissed the writ as improvidently granted for the reasons set forth in his dissent in *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500, 524.

Mr. Justice HARLAN, joined by Mr. Justice BURTON and Mr. Justice WHITTAKER, also dissented. The facts of the case, which are set forth only in a footnote to this dissenting opinion, raised several issues of negligence, and the trial court directed the jury to bring in a general verdict on the issue whether the respondent had negligently failed to furnish petitioner with a safe place to work and if so whether such failure was a contributing cause to the accident, and also directed the jury to make findings on special issues put to it by the court. The general verdict was in favor of the petitioner, but the findings on the special issues were in the respondent's favor, and, according to the view of the dissent, wholly inconsistent with the general verdict. The state appellate court held that the general verdict must yield to the inconsistent findings on the special issues. The dissent took the position that the procedural rule which the appellate court applied to resolve the "head-on collision" in the jury's verdict did not subvert assertion of the federal rights established by the Federal Employers' Liability Act", and did not deprive the petitioner of any substantive right given to him by a federal statute.

The case was argued by James O. Bean for petitioner and by Charles L. Cobb for respondent.

Railroads . . . *Safety Appliance Acts*

Baltimore and Ohio Railroad v. *Jackson*, 353 U. S. — , 1 L. ed. 2d 862, 77 S. Ct. 842, 25 U. S. Law Week 4303. (No. 370, decided May 13, 1957.) *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Affirmed.*

The sole question in this case was whether a motor track car towing a push truck on a railroad came under the coverage of the Safety Appliance Acts. The railroad contended that neither vehicle was within the acts, and, in the alternative, that if such vehicles were covered, they were "four wheel cars" exempted from the statute by Section 6.

The respondent, a crew foreman, was thrown from the track car when it struck a large dog. The respondent applied the hand brake to halt the cars when he saw the dog, but the cars skidded about thirty-nine feet before the impact. He further testified that the track car alone, without the hand car attached, would have stopped under the same conditions in some six to eight feet. The District Court instructed the jury that the provisions of the Safety Appliance Acts covered the vehicles in question. The jury returned a verdict in favor of the respondent, and the Court of Appeals affirmed.

Mr. Justice CLARK delivered the opinion of the Supreme Court which affirmed the lower courts' decisions. The controlling factor, according to the Court, was the nature of the employment of the vehicles in the railroad's service. Here, the motor track car was being used as a locomotive to push the hand car used to haul material, tools and equipment. The Safety Appliance Acts, the Court reasoned, require a locomotive pushing a car to be equipped with efficient brakes and the absence of such brakes here was a violation of the Acts. The Court brushed aside an argument that the Interstate Commerce Commission for some sixty years had considered maintenance-of-way vehicles not subject to the statutes, saying that while long administrative practice is entitled to weight, in this case there was no expressed administrative determination of the problem. The Court suggested that the Commission thought the problem too insignificant for consideration.

The Court also rejected the contention that the track car and the hand car came within the "four-wheel car" train exception of Section 6 of the statute. The legislative history, said the Court, indicates that this exception was enacted specifically to exempt coal cars.

Mr. Justice BURTON, joined by Mr. Justice FRANKFURTER, Mr. Justice HARLAN and Mr. Justice WHITTAKER, dissented, arguing that nothing in the language of the Safety Appliance Acts or their legislative history indicates that Congress intended them to apply to track cars or hand cars, and that this view was buttressed by long administrative interpretation.

The case was argued by Stephen Ailes for petitioner and by Milford J. Meyer for respondent.

Taxation . . .
defense construction deduction

United States v. *Ohio Power Company*, 353 U. S. 98, 1 L. ed. 2d 683, 77 S. Ct. 652, 25 U. S. Law Week 4229. (No. 312, decided April 1, 1957.) *On petition for rehearing. Reversed.*

The issue in this case was the authority of the War Production Board to certify only a part of the cost of the construction of a defense plant as necessary in the national defense and hence eligible for the accelerated amortization provisions of Section 124 (f) of the 1939 Internal Revenue Code. The Court of Claims had held that the taxpayer was entitled to accelerated amortization of the entire cost of the wartime facilities it had constructed. The issue was the same as that presented in *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, 1 L. ed. 2d 347, 77 S. Ct. 343, 25 U. S. Law Week 4095, and *National Lead Co.* v. *Commissioner*, 352 U. S. 313, 1 L. ed. 2d 353, 77 S. Ct. 347, 25 U. S. Law Week 4097, both decided January 22 (see the April, 1957, issue of the JOURNAL, 43 A.B.A.J. 347).

In a *per curiam* opinion, the Court noted that the judgment of the Court of Claims could not stand "If there is to be uniformity in the application of the principles announced in those two companion cases". Accordingly, it granted the petition for rehearing, vacated the order denying certiorari, and reversed the judgment of the Court of Claims on the authority of the January 22 cases. The Court declared that "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules".

Mr. Justice BRENNAN and Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice HARLAN wrote a dissenting opinion in which he was joined by Mr. Justice FRANKFURTER and Mr. Justice BURTON. The dissent pointed out that the Court had overturned the judgment of the Court of Claims nearly a year and a half after it had first denied certiorari and in spite of the subsequent denial of two petitions for rehearing. This was a violation of the Court's own Rules, designed to further the "deep-rooted policy that adjudication must at some time be final", the dissent argued.

Taxation . . .
health insurance

Haynes v. *United States*, 353 U.S. 81, 1 L. ed. 2d 671, 77 S. Ct. 649, 25 U. S. Law Week 4228. (No. 257, decided April 1, 1957.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Reversed.*

The crucial question in this case was the meaning of the words "health insurance" as used in Section 22 (b) (5) of the 1939 Internal Revenue Code which allows an exemption from income of money received "through accident or health insurance".

The petitioner, an employee of Southern Bell Telephone and Telegraph Company, was paid $2,100 disability benefits during 1949. The payment was made under the company's "Plan for Employees' Pension, Disability Benefits and Death Benefits". The plan entitles every employee, among other benefits, to the payment of definite amounts when he is disabled by accident or sickness, the amounts varying according to length of service. Since the petitioner had been employed by the firm for more than twenty-five years, he was entitled to full pay for fifty-two weeks, and the amount he received under the plan was the equivalent of what he would have received had he been working. The Government collected $318.44 income tax on the benefits. The petitioner brought this action for recovery, contending that the amount he had received under the plan was exempt under Section 22 (b) (5). The District Court agreed, but was reversed by the Court of Appeals.

Mr. Justice BLACK delivered the opinion of the Supreme Court holding in the taxpayer's favor. The Court defined health insurance as "an undertaking by one person for reasons satisfactory to him to indemnify another for losses caused by illness". The fact that the employee here paid no fixed periodic premiums, that there was no definite fund created to assure payment of the benefits, and that the amount and duration of the benefits varied with the length of service did not remove the plan from the general category of health insurance, the Court declared. There was nothing in the statute or its history to show that Congress intended to restrict the exemption to "conventional modes of insurance", the Court observed.

Mr. Justice BURTON and Mr. Justice HARLAN noted their dissent "for the reasons stated in the opinion of the Court of Appeals".

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

The case was argued by John H. Hudson for petitioners and by Hilbert P. Zarky for the respondent.

Taxation . . .
retroactivity

Automobile Club of Michigan v. *Commissioner*, 353 U. S. 180, 1 L. ed. 2d 726, 77 S. Ct. 707, 25 U. S. Law Week 4247. (No. 89, decided April 22, 1957.) *On writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Affirmed.*

This case arose out of the revocation in 1945 of previous rulings by the Commissioner exempting automobile clubs from the payment of federal income taxes. In revoking his earlier rulings, the Commissioner retroactively assessed taxes for the years 1943 and 1944 and determined that prepaid club dues should be included in the club's income in the year received, rejecting the club's accounting method which reported as income only that part of the dues which was earned during the year.

The Tax Court and the Court of Appeals sustained the Commissioner on all points. The petitioner conceded that it was not a "club" entitled to exemption from the income tax and that the earlier rulings of the Commissioner granting it exemption were erroneous as a matter of law, but it contended that the Commissioner had no power to apply his revocation retroactively, and that in any event, the assessment of taxes for 1943 and 1944 was barred by the statute of limitations.

Mr. Justice BRENNAN, speaking for the Supreme Court, affirmed the judgments below. The Court rejected the argument that the Commissioner was equitably estopped from applying the revocation retroactively, saying that that doctrine is not a bar to a correction by the Commissioner of a mistake of law. The Commissioner could not be overruled, the Court said, unless there was an abuse of discretion. Since the Commissioner had dealt with petitioner upon the same basis as other automobile clubs, the Court could see no such abuse. The Court also rejected a contention that Section 3791 (b) of the 1939 Code forbade the Commissioner to take retroactive action and refused to hold that repeated re-enactments of Section 101(9) gave the force of law to the Treasury Regulations under which the club had been ruled exempt.

As for the argument that the assessments for 1943 and 1944 were barred by the statute of limitations, the Court replied that the "express condition" prescribed by Congress was that the statute run against the United States from the date of the actual filing of the return. The Forms 990, informational forms filed by the club, were said to lack the data necessary for the computation and assessment of deficiencies, and were not tax returns within the meaning of the Code.

The Court also upheld the Commissioner in requiring the club to report as income all dues collected during the tax year. The club had unrestricted use of the funds during that year, the Court pointed out, and the club's method of pro rating dues in monthly amounts was said to be "purely artificial".

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

Mr. Justice BURTON and Mr. Justice CLARK concurred in the Court's opinion in holding that the Commissioner did not abuse his discretion in revoking previous rulings exempting the petitioners from the payment of income taxes and in assessing taxes retroactively, and in its holding that the deficiencies for 1943 and 1944 were not retroactive. They dissented however from the Court's holding that the Commissioner acted within his discretion when he determined that the petitioner's method of accounting for prepaid dues did not truly reflect its income.

Mr. Justice HARLAN wrote a dissenting opinion which argued that the retroactive revocation of the Commissioner's previous exemption rulings was barred by the statute of limitations. In his view, the statute began to run when the petitioner filed the Forms 990 in 1943 and 1944. The dissent also disagreed that the Commissioner could properly tax in the year of receipt the full amount of petitioner's prepaid membership dues. The accrual method used by the taxpayer reflected its net earnings with greater accuracy than the method proposed by the Commissioner, the dissent declared, and there was nothing to indicate that the accrual method deferred income in an unreasonable manner.

The case was argued by Ellsworth C. Alvord and Raymond H. Berry for the petitioner and by John N. Stull for the respondent.

The President's Page

(Continued from page 579)

signing a lawyer to the Washington office is simply intended to relieve individual members of the Association charged with the duty of shepherding legislation through the Congress and keeping all Sections and Committees up to date with developments on the Washington scene. The proposal is indicative of the Association's program of devising new techniques as required by the problems and needs of the day.

As this administration nears a close, I am more than ever impressed by the growing prestige and extending sphere of influence of our Association. It is good that it is so, because there remains much to be done. We have made great strides in improving the administration of justice, but the ultimate goal is still far from attainment. Until we have succeeded in removing the judiciary from politics, breaking the log-jam of court congestion and insuring legal services for everyone in this land irrespective of ability to pay, we cannot rest from our labors.

All of us who have worked with my successor, Charles S. Rhyne, of Washington, D. C., know him as a man of vision and industry who will gear the Association to meet the challenge of our times. For him, I can only wish that his tour of duty proves as enriching and rewarding an experience as it was for me. Godspeed to you all.

What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE

Richard B. Allen • ASSISTANT

Antitrust Law . . .

The Cellophane case's "relevant market" doctrine, formulated by the Supreme Court in *U.S.* v. *du Pont*, 351 U.S. 377, has been applied by the Court of Appeals for the District of Columbia Circuit to deny treble-damages recovery to a Baltimore Packard dealer whose suit was predicated on a charge that Packard refused to renew its franchise because of an agreement to make another the exclusive dealer in Baltimore.

In *du Pont* the Supreme Court ruled that, although du Pont produced about 75 per cent of the Cellophane sold in this country, there was no monopoly because the "relevant market" was flexible packaging materials, including such things as glassine, waxed paper and foil, and Cellophane accounted for only 17.9 per cent of this market.

Following this rule, the Court held: "Since there are other cars 'reasonably interchangeable by consumers for the same purposes' as Packard cars and therefore in competition with Packards, an exclusive contract for marketing Packards does not create a monopoly."

One judge dissented. He emphasized that the jury's factual determination, based on proper instructions, should not be overturned. He also noted that the grant of an exclusive franchise in this case resulted from an agreement vertical in nature, that is, between the manufacturer and a retailer in the area, to exclude all other retailers.

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

(*Packard Motor Car Company* v. *Webster Motor Car Company*, United States Court of Appeals, District of Columbia Circuit, April 18, 1957, Edgerton, C.J.)

Censorship . . .
movies and books

An Illinois court has upset Chicago's censorship ban of *The Miracle* but has refused to declare unconstitutional the ordinance under which the censorship was possible.

Both the instant case and *The Miracle* have extensive judicial backgrounds. The picture was refused a license in Chicago by the police commissioner, who is vested by city ordinance with licensing powers and who must refuse a license if he finds a picture, among other things, to be "immoral or obscene. . . ." There is an administrative appeal to the mayor. The police commissioner determined *The Miracle* was immoral and obscene, and the mayor agreed.

A trial judge, without reviewing the commissioner's determination, held the ordinance unconstitutional. On appeal, the Supreme Court of Illinois ruled that the ordinance was valid, but remanded the case to the trial court for a finding as to whether the picture was "obscene". 3 Ill. 2d 334 (40 A.B.A.J. 1087; December, 1954). But an immediate appeal was taken to the United States Supreme Court, which had previously seen the film in the course of determining that New York could not ban it as "sacrilegious" in *Burstyn, Inc.* v. *Wilson*, 343 U.S. 495. In view of the state of the Illinois record, the Supreme Court refused to take jurisdiction for want of a final judgment. 348 U.S. 979 (41 A.B.A.J. 557; June, 1955).

The case then returned to the Illinois trial court, where another judge agreed with the commissioner's ruling of "immoral and obscene". And now, on appeal to the Appellate Court of Illinois for the First District, the commissioner has been reversed.

The Court, adopting the view that a work falling within the protective ambit of the First Amendment must be found immoral and obscene in its over-all effect on "average, normal" individuals, declared that "indeed it appears unlikely that even the salaciously inclined individual would be so affected by a film whose central character is clothed only in rags and whose personality is devoid of any charm. . . ."

Continuing, the Court said: "Censorship is not unconstitutional, but it is a power which must be exercised with the greatest care . . . a motion picture should not be excluded from public view unless it is fairly shown to lie within the proscribed area defined by the ordinance. *The Miracle*, as we view it, is not such a picture."

(*American Civil Liberties Union* v. *City of Chicago*, Appellate Court of Illinois, First District, March 18, 1957, Friend, J., 141 N.E. 2d 56.)

The question of obscenity has not as yet been presented in a Michigan case where the Circuit Court of Wayne County has enjoined the Detroit Chief of Police and the head of the Censor Bureau from overstepping their supposed censorship authority.

A book, *Ten North Frederick*, a best-seller and winner of the 1955 National Book Award, was involved. In January of 1957 the Police Chief announced publicly that the book was obscene and the Censor Bureau Chief notified book dealers in Detroit that sale of the book would

mean arrest and prosecution under state statute and municipal ordinance.

The Court rejected the defendants' arguments that they were acting within statutory powers conferred on them. It held that their only power was to arrest and prosecute under the law, in which case a review of the obscenity determination would be guaranteed.

The Court declared that the defendants had circumvented the judicial process and had effected a ban on the sale of the book "by their non-judicial determination that the book is obscene, their announcement of the fact, and their notifying booksellers that the sale of the book would lead to prosecution". This conduct, the Court concluded, violated First and Fourteenth Amendment rights.

The Court also turned down an argument that the sale of the book had not been halted by official action, but rather by voluntary action of booksellers. This was naïve, the Court said.

The Court awarded an injunction against the defendants' actions, but not against their authority to enforce any state statute or Detroit ordinance.

(*Random House, Inc.* v. *City of Detroit; Bantam Books, Inc.* v. *Same,* Circuit Court of Wayne County, Michigan, March 29, 1957, Weideman, J., not reported.)

Communications Law . . . *telephones*

Distinguishing but apparently disagreeing with the Illinois Appellate Court's holding in *Illinois Bell Telephone Company* v. *Miner,* 136 N.E. 2d 1 (42 A.B.A.J. 1047; November, 1956), the Supreme Judicial Court of Massachusetts has turned down a telephone company's suit for an injunction enjoining the distribution of plastic, opaque telephone book covers. In *Illinois Bell* the court held that the company stated an equitable cause of action predicated on continuing trespass against its telephone books; in the instant case, the decision was made after full hearing.

The Massachusetts court could find little to support a trespass theory, particularly in view of the wide distribution of telephone books and their almost unrestricted use by subscribers, albeit bare legal title was retained by the company. Neither could it see much to the contentions that the covers interfered with the company's service to the public and that the covers were unfair competition since they carried advertising presumably competing with the yellow-page advertising.

The Court saw no misappropriation of the telephone company's work product, nor a "palming-off" —elements traditionally associated with unfair competition. The telephone company's audience for its directories is not a captive one, the Court observed. To grant relief, it said, "would lead to an undue extension of the telephone company monopoly in an area in which the legislature has granted it none. . . ."

(*New England Telephone & Telegraph Company* v. *National Merchandising Corporation,* Supreme Judicial Court of Massachusetts, April 5, 1957, Cutter, J., 141 N.E. 2d 702.)

The Supreme Court of Alabama has ruled that a telephone company does not have to cut off or monitor the calls from a subscriber who, it is charged, is making a nuisance of herself by repeated and harassing calls to another.

This too was an equity action, and the relief asked against the telephone company was that it be required to remove the telephone from the alleged offender's house or keep a record of all calls from that telephone to the homes of the plaintiff and eight friends and relatives listed in the complaint.

The Court declared the relief asked against the telephone company was novel, but viewed it as a complaint that the company was not rendering adequate service as required by Alabama law.

With this the Court could not agree. "If anything", it remarked, "the alleged circumstances disclose a more than adequate service. . . . If [a telephone] is used as an instrumentality for the creation of a private nuisance the responsibility for the nuisance rests with the individual who abuses the service and not with the telephone company."

(*Mickwee* v. *Boteler,* Supreme Court of Alabama, February 28, 1957, Goodwyn, J., 93 So. 2d 151.)

Contempt . . . *congressional committee*

At what point can a witness stop answering questions, if he wishes to invoke the self-incrimination clause of the Fifth Amendment while appearing before a congressional investigating committee? If he proceeds too far, he may find that he has waived his privilege or that he cannot rely on it because anything further cannot incriminate him more than what has gone before.

But now the Court of Appeals for the Ninth Circuit has ruled that at least the witness must answer such preliminary questions as his name, address and school attendance. The Court noted that under the historical development of the privilege against self-incrimination, it is only in direct defense of a crime that a defendant does not have to testify at all. A subpoenaed appearance before a grand jury or a congressional investigating committee is different, the Court said; in such instances the witness should identify himself. "We do not hold", the Court continued, "that there never can be a case where a witness cannot refuse to state his residence. We do think that a factor to be considered in determining privilege is that it is a rare, rare case where disclosure of address would lead to incrimination." The Court refused to consider a committee report, not produced in the trial court, that indicated Communists used certain homes as mail drops.

The Court concluded that the defendant's fears that by answering he would be furnishing links in a chain of convicting evidence were "imaginary and perhaps even an afterthought".

(*Wollam* v. *U.S.,* United States Court of Appeals, Ninth Circuit, May 2, 1957, Chambers, J.)

Contempt . . .
judicial proceedings

The running comments of a Chicago television performer on the proceedings of a marital case in which his name was being prominently mentioned have been declared contempt of court by the Supreme Court of Illinois. The conviction of the commentator—Tom Duggan—has been reversed, however, because the trial judge did not disqualify himself to rule on the charges.

In a hotly-contested child custody hearing, in which custody was being sought by a husband who was suing his wife for a divorce, a private detective testified that the wife had spent the wee small hours of two mornings in Duggan's apartment. While this hearing and subsequent renewals of it were in progress, Duggan, who had the forum of a nightly television show, delivered his comments on the proceeding. He called the detective a "professional liar and sneak", he declared that the wife's family (at least two of whom also testified) had "court-admitted hoodlum connections", and he vowed that he would do everything in his power "to prevent the legal kidnaping of her child".

The Court emphasized that critical comment on legal proceedings, particularly after their conclusion, is entirely proper and salutary, and that, within bounds, comment during proceedings is not proscribed. It conceded that the First Amendment gives broad protection to freedom of speech. But here, the Court declared, the comments appeared to be designed to influence or affect the administration of the courts and thus were contempt without protection.

"The comments involved here", it said, "were delivered by one who had a personal and professional interest in the decision in a pending action, and they were admittedly designed to affect that decision by a sustained and systematic attempt to prevent or impugn unfavorable testimony by vilifying any witness who should offer such testimony as well as the party in whose behalf the witness appeared. . . . We hold that the statements . . . constituted a clear and present danger to the administration of justice."

On the change of venue point on which reversal was based, the Court said that the trial judge should have granted the change on the filing of what it held was a proper affidavit, even though the trial judge apparently denied the motion because he did not wish to appear to be yielding to pressure which Duggan had attempted to bring through "unnamed politicians".

(*Illinois* v. *Goss*, Supreme Court of Illinois, March 20, 1957, *per curiam*, 10 Ill. 2d 533, 141 N.E. 2d 385.)

Corporation Law . . .
stockholders' actions

The Court of Appeals for the Second Circuit has affirmed the disallowance of counsel fees to the plaintiff in a stockholder's derivative action, but on different grounds from those relied on by the district court.

The plaintiff, a stockholder of Merritt-Chapman & Scott Corporation, brought a suit on behalf of the corporation to enjoin Louis E. Wolfson and another from serving as directors of this corporation at the same time they served as Montgomery Ward directors. The ground of the suit was that the corporations were in competition. Since the object of the action was to de-interlock corporate directorships, the district judge ruled against the allowance of fees because the plaintiff had not exhausted his "gratuitous remedy": an application to the Federal Trade Commission to accomplish the same purpose. 141 F. Supp. 453 (42 A.B.A.J. 959; October, 1956).

The Second Circuit criticized this ruling. The plaintiff was not restricted to a "gratuitous remedy", it said, and, citing law review articles, it remarked that "it seems well known that the Commission has found little occasion, and perhaps little incentive, to take action" in interlocking directorship cases. "It seems not in the public interest", it added, "to require stockholders to await delaying or non-existent agency action".

The Court found its own ground for denial of counsel fees. This was that the plaintiff had failed to show the necessary substantial benefit to the corporation from the suit.

(*Schechtman* v. *Wolfson*, United States Court of Appeals, Second Circuit, May 2, 1957, Clark, C.J.)

Criminal Law . . .
wire-tapped evidence

Emphasizing that the federal court ban against the admissibility of illegally obtained evidence applies only when the evidence is gathered by federal officers, the Court of Appeals for the Second Circuit has held that wire-tapped evidence obtained by state officers may be admitted in a criminal prosecution in a federal court.

The Court found there was little doubt that the arrest and subsequent prosecution flowed from a wire-tap set up by New York state officers and that the tap violated the anti-wire-tap provisions of 47 U.S.C.A. §605. But, the Court observed that there is no rule that all evidence obtained by means of an unlawful or unconstitutional search and seizure is inadmissible in a federal court. The Court noted that the defendant must be the victim of the illegality and that, more important in the instant case, federal officers must have participated in the illegality.

The essential basis of the inadmissibility rule, the Court declared, was the thought that it discourages the activities of overzealous law enforcement officers. But since the federal courts do not exclude evidence of federal crimes obtained by state officers, by whatever means, in seeking to enforce state law, the Court continued, exclusion by the federal courts would not deter such state activity.

(*U.S.* v. *Benanti*, United States Court of Appeals, Second Circuit, May 6, 1957, Medina, J.)

A federal district court has held that wire-tapped evidence can be produced without a physical tampering or tapping of the wire.

The United States District Court

for the Southern District of New York was faced with a case in which Government agents recorded a telephone conversation by means of a microphone placed near a telephone used by an informer and special employee of the Federal Bureau of Narcotics in talking with the defendant. The question was whether the means of interception rendered the conversations inadmissible as evidence because procured in violation of 47 U.S.C.A. §605, which states that ". . . no persons not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person". This was the only question since the Court was bound by the Second Circuit's rule, contrary to some other circuits, that each party to a conversation is a sender as well as a receiver whose consent is required, and the defendant had obviously not consented.

The Court ruled that the means of interception made no significant difference. The fact of interception is the essence of the case, it said, in denying admission to the recorded conversations. The basic purpose of the statute, the Court declared, is to protect the privacy of telephone conversations, and this purpose could not be accomplished if it gave way to a modern technological advance in tapping methods.

(*U.S.* v. *Hill*, United States District Court, Southern District of New York, February 19, 1957, Weinfeld, J., 149 F. Supp. 83.)

Damages . . . *excessive*

Because a jury apparently failed to reduce the gross value of a decedent's life to its present cash value, a Georgia court has held that the award of $80,000 in a wrongful-death case was excessive.

The complaint asked for $104,256, based on a life expectancy of 28.96 years times the decedent's best earnings of $3,600 a year, and the plaintiff introduced the Carlisle mortality table to support the life expectancy. But, making its own computations, the Court of Appeals of Georgia, found that if the gross value of the life were $104,256, the present value at 7 per cent would be $39,718.80.

The jury has a latitude in determining the value of a person's life, the Court continued, and mortality tables are not conclusive, but are a reasonable criterion. But, the Court said, to arrive at a verdict of $80,000 as the present value of the deceased's life, the jury would have had to find a life expectancy of 38.59 years and an annual income of $6,646.17. The Court concluded that while the jury might have found a life expectancy ten years in excess of the mortality table, there was no evidence to support a yearly income in the $6,600 range.

(*Swift & Company* v. *Lawson*, Court of Appeals of Georgia, Division No. 1, January 11, 1957, rehearing denied February 6, 1957, Felton J., 97 S.E. 2d 16[9].)

Libel and Slander . . . *proof of damages*

A prominent New York Republican has lost a $50,000 libel judgment against the *New York World-Telegram* because the New York Court of Appeals has ruled that the trial judge permitted him to testify too broadly about the aversion, humiliation and contempt he suffered as a result of the publication.

The case involved the famous Hanley letter, written by Joe R. Hanley, then Lieutenant Governor of New York, to the plaintiff in September, 1950. The Governor, Thomas E. Dewey, had announced his intention not to stand for renomination by the Republican Party, and the Hanley letter related that Hanley was reluctant to withdraw his name for the gubernatorial nomination and to accept nomination for the United States Senate in consideration of what the letter termed an "iron-clad, unbreakable agreement". The letter was written on the eve of the Republican State Convention.

About five weeks later an article in the *World-Telegram*, ascribing its sources as "several persons", alleged that the plaintiff had used the Hanley letter to attempt to get the senatorial nomination for himself by threatening to make the letter public if not so nominated.

This was not true and the jury by its verdict turned down the paper's defense of truth. But four judges of the Court reversed and granted a new trial because of the range permitted to the plaintiff in his testimony. This evidence was that after the publication he received scurrilous letters, had his membership in a Washington country club cancelled, and suffered the humiliation of having the United States House of Representatives refuse to seat him in 1951. As to the latter incident, the plaintiff testified that the article "had considerable effect upon the decision of the House in not seating me".

The Court conceded that the question of how far a libel plaintiff may be permitted to go in his own testimony was left open by it in *Julian* v. *American Business Consultants*, 2 N.Y. 2d 1 (43 A.B.A.J. 68; January, 1957), but it declared that the testimony in this case "even if not inadmissible by its nature, was presented in such form and quantity as to violate the rights of defendant". The Court based its reasoning on the ground that statements about the general, as opposed to specific, effects of the libel, and when presented by the plaintiff himself, offer the defendant an inadequate opportunity to cross-examine as to whether the libel caused the effects.

Three judges dissented, with the statement that the plaintiff's testimony was properly admitted and that the defendant had not made an adequate objection to it at the trial.

(*Macy* v. *New York World-Telegram Corporation*, New York Court of Appeals, March 8, 1957, Desmond, J., 2 N.Y. 2d 416, 161 N.Y.S. 2d 55, 141 N.E. 2d 566.)

Literary Property . . . *tax-service idea*

The United States District Court for the District of Massachusetts has dismissed a suit brought against Erwin N. Griswold, Dean of the Har-

vard Law School, and the President and Fellows of Harvard College, for alleged appropriation of a literary idea.

In 1950 the plaintiff wrote Dean Griswold asking his help in editing the text of a Latin American loose-leaf tax service on which the plaintiff said he was working. The letter stated the service would be "along the lines of the tax services published in this country [the United States] . . . by Prentice-Hall and Commerce Clearing House." Some further correspondence ensued, but the parties never got together.

Subsequently Harvard Law School, in co-operation with the United Nations, began collecting and publishing foreign tax information and in 1954 work on a tax series was begun. While none has been published, the Court examined a prototype and found it completely different from an Argentine tax law service published by the plaintiff.

Granting the defendants a summary judgment, the Court held that an idea is entitled to protection only if it is novel and original. Here the Court found neither element. It pointed out that the plaintiff admitted his idea was "along the lines" of other services, and affidavits showed that loose-leaf foreign tax services were in existence. Thus, the Court concluded, since the plaintiff disclosed no protectible idea, he could not recover.

(*Puente* v. *President and Fellows of Harvard College,* United States District Court, District of Massachusetts, February 26, 1957, Sweeney, J., 149 F. Supp. 33.)

Schools . . . *segregation*

Virginia's answer to school integration—a state-wide pupil placement law—has been declared unconstitutional on its face by the United States District Court for the Eastern District of Virginia. The legislation is directly in the teeth of the Supreme Court's pronouncements in the *School Segregation Cases,* 347 U.S. 483, the Court said.

To reach its conclusion the Court considered not only the placement act itself, but also several forerunners and statements of the objectives of the legislation. This consideration proved fatal to the placement law, which does not itself list race as a basis for pupil assignment.

But the Court took notice of the fact that Virginia's Governor had convened a commission which filed a report (the Gray report) that separate school facilities were for the best interests of both white and colored races, that the state's legislature had adopted an "interposition resolution" challenging the "usurped authority" of the United States Supreme Court, that the Governor had in an address to the legislature recommended the continuation of segregated schools, and that the legislature had passed an appropriation bill cutting off money to school systems that were not "efficient", an "efficient" system being defined as one providing separate facilities.

The Court examined and rejected an argument that administrative remedies contained in the placement law had not been exhausted. These remedies, the Court declared were a mirage and, if followed, would be nugatory. Application of the rule of exhaustion of administrative remedies, the Court concluded, required that there be some remedy.

(*Adkins* v. *School Board of the City of Newport News,* United States District Court, Eastern District of Virginia, January 11, 1957, Hoffman, J., 148 F. Supp. 430.)

Meanwhile another judge of the same federal court in Virginia—dealing with one of the original five school segregation cases—has declined to offer immediate relief to the plaintiffs.

Expressing the opinion that gradualism will produce better results than the fixing of definite dates by which time public schools must be integrated, the Court said: "It is imperative that additional time be allowed the defendants in this case, who find themselves in a position of helplessness unless the Court considers their situation from an equitable and reasonable viewpoint."

The school board had made no showing apparent in the opinion that any steps toward compliance with the Supreme Court's mandate were being undertaken. But the district judge emphasized that the Supreme Court left implementation to local district courts, which are able to apply the "traditionally flexible principles of equity" to varying situations. In this connection the judge noted an increase in racial tensions in the area and declared that schools would be closed if integration were ordered with any immediacy. This would be a disaster to the children of both races, he said.

The Court therefore refused to rule on the motion of the plaintiffs for further relief, but gave them the right to renew the motion "at a later date after the defendants have been afforded a reasonable time to effect a solution". But in so doing, the Court warned that the Supreme Court's rulings were "the law of this case and must be observed".

The present posture of this case did not present the district court with an opportunity to rule on the constitutionality of the Virginia pupil placement law or the administrative remedies contained in it.

(*Davis* v. *County School Board of Prince Edward County,* United States District Court, Eastern District of Virginia, January 23, 1957, Hutcheson, J., 149 F. Supp. 431.)

What's Happened Since . . .

■ On April 22, 1957, the Supreme Court of the United States:

DENIED CERTIORARI in *Wichita Falls Independent School District* v. *Avery,* 241 F. 2d 230 (43 A.B.A.J. 352; April, 1957), leaving in effect the decision of the Court of Appeals for the Fifth Circuit that a Texas school board had shown a "prompt and reasonable" start toward desegregation and that therefore a federal district court was justified in withholding injunctive relief sought by Negroes, but that the court was correct in retaining jurisdiction, since the board's actions did not render the case moot.

■ On April 29, 1957, the Supreme Court of the United States:

REVERSED JUDGMENT *(per curi-*

um) in *Pennsylvania* v. *Board of Directors of City Trusts of the City of Philadelphia,* overturning the decisions of Orphans' Court of Philadelphia County, 4 D. & C. 2d 671 (41 A.B.A.J. 1041; November, 1955) and the Supreme Court of Pennsylvania, 386 Pa. 548 (43 A.B.A.J. 165; February, 1957). Both Pennsylvania courts had ruled that the fact that an official board of Philadelphia administered the trust funds of Girard College, at which the Girard will limits enrollment to white students, did not render the refusal to admit Negro students state action. The United States Supreme Court held, however, that the board was a state agency and, even though only a trustee, was acting as a state agency. Thus refusal to enroll Negroes was discrimination prohibited by the *School Segregation Cases,* 347 U.S. 483.

■ On May 6, 1957, the Supreme Court of the United States:

REVERSED (unanimously, with opinions by Mr. JUSTICE BLACK and MR. JUSTICE FRANKFURTER) the decision of the Supreme Court of New Mexico in *Schware* v. *Board of Bar Examiners,* 60 N.M. 304, 291 P. 2d 607 (42 A.B.A.J. 352; April, 1956), in which the New Mexico Court upheld the denial by the state board of bar examiners of permission to take the bar examination sought by an applicant who had Communist connections and who had participated in labor strife, all in the period from 1932 to 1940. The Supreme Court held the denial deprived the applicant of due process under the Fourteenth Amendment, the applicant being otherwise fully qualified to take the examination.

■ On April 26, 1957, the Court of Appeals for the Eighth Circuit AFFIRMED the decision of the United States District Court for the Eastern District of Arkansas in *Aaron* v. *Cooper,* 143 F. Supp. 855 (43 A.B.A.J. 69; January, 1957), that the Little Rock plan for progressive integration of public schools—a procedure contemplating no segregation by the end of 1963—complies with the United States Supreme Court's implementation decision in the *School Segregation Cases,* 349 U.S. 294. The Court also approved retention of jurisdiction by the district court to insure "full opportunity for showing in the event compliance at the 'earliest practicable date' ceases to be the objective".

■ On March 8, 1957, the Court of Appeals of New York (2 N.Y. 2d 446, 161 N.Y.S. 2d 81, 141 N.E. 2d 584) AFFIRMED (with two judges dissenting) the decision of the Supreme Court Appellate Division, Third Department, in *Toomey* v. *New York State Legislature,* 147 N.Y.S. 2d 239, 1 A.D. 2d 41 (42 A.B.A.J. 355; April, 1956), that an elected member of the legislature of New York is not an "employee" of the state so as to entitle his widow to death benefits under the state's workmen's compensation law.

■ On April 1, 1957, the Supreme Court of the United States:

DENIED CERTIORARI in *National Hells Canyon Association, Inc.* v. *Federal Power Commission,* 237 F. 2d 777 (42 A.B.A.J. 1156; December, 1956), leaving in effect the decision of the Court of Appeals for the District of Columbia Circuit denying the cancellation of a license issued by the Federal Power Commission to the Idaho Power Company to build and operate three hydroelectric dams in the Hells Canyon reach of the Snake River in Oregon and Idaho.

1957 Ross Prize Essay Contest Won by Washington, D. C., Lawyer

John Pryor Furman, member of a Washington, D. C., consulting firm, is the winner of the twenty-fourth annual Ross Prize Essay Contest conducted by the American Bar Association.

Mr. Furman was born in Newark, New Jersey, in 1920. He attended public schools in South Orange and Maplewood, New Jersey, and was graduated from Phillips Academy, Andover, Massachusetts, in 1938. In 1942 he was graduated from Princeton University, where he majored in public and international affairs.

Following his graduation from college, Mr. Furman went to Washington, D. C., with the National Institute of Public Affairs, an internship training program in public administration. He was employed in the Office of Price Administration, served briefly in the Army and later worked for the Office of Dependency Benefits of the Army Service Forces.

Mr. Furman was graduated from Yale Law School in 1946. In 1944-1945 he was editor-in-chief of the *Yale Law Journal.*

From 1946 to 1956 he was with the Department of State. In 1946-1948 he was an economist in the Industry Branch of the Office of International Trade Policy, and in 1949-1956 he was in the Legal Adviser's Office, specializing in problems relating to Germany and Austria and, later, the Mutual Security (foreign aid) Program.

Mr. Furman is a member of the Bars of the District of Columbia and of the United States Supreme Court. He has been a Lecturer in Law at The American University where he received a master's degree in economics in 1954. He is a member of the Order of the Coif.

He is married to the former Erin Weller Maclay of Houston, Texas. They have two daughters and live in Bethesda, Maryland.

Mr. Furman's winning essay will be published in the JOURNAL in the fall, and he will deliver a summary of it during the New York portion of the Annual Meeting this month.

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, George D. Webster, Chairman.**

Associations Taxable as Corporations—Real Estate Investors

By Francis W. Sams, Miami, Florida

Ordinarily all parties in a real estate venture which includes nonprofessional investors would prefer an organization having the attributes of a corporation—tax considerations aside. Operators desire the broad authority to make decisions as required, such as have corporate officers and directors, and they are opposed to interruptions in the venture caused by the death or withdrawal of an investor. Investors do not like to be bothered with frequent demands on their attention, and limited liability is preferred.

Taxwise, of course, it is usually desirable to avoid classification as a corporation in order to avoid the corporate tax. (*Cf.* Section 1361 and proposed Section 1351 of the 1954 Code.)

It is clear, therefore, that the architect of a real estate group venture has a real task cut out for himself. He must strike the best possible balance between basically contradictory concepts, those of associated endeavor and those of individual endeavor.

The law determining what business bodies are taxable as corporations is sometimes difficult to apply, and there are hosts of apparently conflicting rulings and decisions. All that the 1954 Code says (Section 7701 (a) (3)) is that for income tax purposes "the term corporation includes associations, joint-stock companies, and insurance companies". The applicable Treasury Regulations construe the above language as imposing corporate tax liability upon most types of associations. The basic decision defining present law is *Morissey* v. *Commissioner*, 296 U.S. 334 (1935). There, it was concluded that the five salient features of a corporation are: title to property held by entity, centralized management, continuity uninterrupted by death, transfer of interest without affecting the continuity of the enterprise, and limitations on the personal liability of the participants. Under the Regulations, it is not necessary that all of these tests be met in order to be classified as an association.

Trusts. Real estate investors have had the least success in avoiding corporate classification when the trust form of operation was used. This is because a trust generally has the corporate attributes set forth in the *Morissey* case. To make it an "association taxable as a corporation", all that is required is the addition of a few powers or activities necessary to satisfy the "doing business" test. Once there has been a conversion from simple "investment" powers to "doing business" powers, then a trust may be taxed as a corporation.

A particularly vulnerable type of trust is the so-called land trust. See Taubman, "The Land Trust Taxable as an Association", 8 *Tax L. Rev.* 103 (1952). However, one form of such a trust, properly drawn, has not been taxed as an association—the ground rent land trust. In *Cleveland Trust Co.* v. *Commissioner*, 115 F. 2d 481 (6th Cir. 1940), *cert. den.* 312 U.S. 704 *(followed: State National Bank* v. *U. S.*, 55 F. Supp. 457 (W. D. Tex. 1944)), the Court held that such a trust was an ordinary trust and that it was not engaged in business. In holding that it was not engaged in business for profit, the court stated (page 484):

> The power of the trustee to receive rents and distribute them to certificate holders did not have the effect of making it an association for profit, nor did the right to possession and disposition of the property to lease or relet it in case of default by the lessee have that effect but was a mere incidental power to be exercised under exceptional circumstances. The trust instrument shows no plan to carry on a business in buying, selling, leasing or dealing in real estate.

Subsequent to the *Morissey* case, it has been consistently held that a trust is taxable as a corporation where it was organized to acquire, improve, subdivide and sell a tract of land. In these cases, the courts are not concerned with any attempt to differentiate the changing operations of the organization over a period of years. The organization's authority to acquire and improve land may be exhausted in the first year or two of its existence, and its remaining life may be devoted exclusively to the liquidation of the subdivided land, but it is nevertheless classified as a corporation throughout the whole term of its existence.

The opposite result has been reached in the case of the "ancestral trust". In *Blair* v. *Wilson Syndicate Trust*, 39 F. 2d 43 (5th Cir. 1930), a trust created by a widow in order to insure an equitable division of her husband's estate, with full powers to hold, operate or sell, constituted a trust, even though it operated the properties, collected rents and carried on all necessary activities to effectuate the trust. The court felt that the ultimate purpose was orderly liquidation and not the carrying on of a business.

Partnerships. The various revenue acts and Codes (now Section 7701 (a) (2)), after loosely treating taxable associations as corporations, dispose of the other types of associations such as joint ventures, pools and syndicates, by considering them as partnerships.

The Treasury Regulations make a simple distinction between a partnership and a taxable association. If two or more persons buy land for

purposes of subdividing and selling it for a profit, taking title in their joint names, they are deemed to have created a partnership. However, where two or more people contribute money or property for the purpose of buying land and if one or more of them or an agent for the group takes the money, purchases and takes charge of selling the land and operating the enterprise, the Service will treat it as an association and tax it as such.

Generally speaking, a partnership whose affairs are carried on by the partners themselves and not by a centralized management, control being exercised in accordance with the respective interests of the partners, and whose continuity is terminated by the death or withdrawal of a member, will not be held to constitute a taxable association. It should be noted that, unlike an ordinary trust, a partnership is "doing business". The test here is whether the other aspects of a corporation are present.

If a real estate venture is carried on as a partnership, the possible application of the "collapsible partnership" provisions (Section 751) should always be considered.

Limited Partnerships. A limited partnership is usually lacking in the characteristics of a corporation except for that of a limitation on the personal liability of the partners. The courts have generally held that a limited jurisdiction must be classified as a simple partnership even though it may have other features of a corporation. Supporting this conclusion is *Glender Textile Co.*, 46 B.T.A. 176 (1942). Such cases as *Giant Auto Parts, Ltd.*, 13 T.C. 307 (1949), may be distinguished. There, the Ohio decisions (in non-tax cases) had decided that an Ohio limited partnership had the characteristics of a corporation. Moreover, the Tax Court emphasized the fact that the limited partnership there operated as a corporation both before and after it operated as a partnership.[1]

Specific plans of operation. Two specific plans of real estate operation should be noted. The SIRE Plan has been utilized so far only for the purchase of rental property in the New York area. Under this plan, the Small Investors Real Estate Plan, Inc., seeks out attractive investment properties which can be purchased either on a free or clear basis or subject only to an institutional first mortgage. After property is found to which the plan is to be applied, a separate corporation is formed to act as an issuer of the fractional titles. This issuing firm then obtains an option to purchase the property. SIRE Plan Portfolios, Inc., a selling organization registered with the S.E.C., acts as underwriter for the offer to the public of these fractional titles by the issuing corporation. Contracts of sale are executed between the issuer and the investors. These are in the usual form of real estate contracts of sale, but they also provide for a waiver by the purchasers of any right to seek a partition of the property. After sale of the offering has been completed, the issuing corporation exercises its option and acquires title to the property. Immediately thereafter, the issuer, as owner, executes and records a lease to an affiliate, SIRE Plan Leaseholds, Inc., which takes legal possession as prime tenant. Then the issuer conveys title to the property, subject to the prime lease, to all the unit purchasers. SIRE Plan Leaseholds, Inc., thus becomes the prime tenant of the purchasers, all of whom constitute the landlord, and the actual occupants of the various rental units become the undertenants of the prime tenant. (From Offering Circular by Riverdale Sire Plan.)

One writer has suggested that the Service could successfully apply the corporate tax to the SIRE Plan. Comment, 4 *U.C.L.A. L. Rev.* 82 (1956). It is reasoned that there is "centralized management" through the prime tenant, which corporation (or its agents) performs all the functions normal to the ownership of property. The writer also contends that there is "continuity of existence".

Another plan has been used by some real estate syndicates—subparticipations. This plan involves for instance eight individuals who hold property as tenants in common. One or more of the eight may have participants with him in financing his ⅛ participation. Their participation is evidenced only by a letter setting forth the basic facts in respect to the participation. The main participants do not know who any of the subparticipants are except their own. The main agreement does not refer to the possibility of subparticipants. It may be that such an arrangement would not be subject to the corporate tax.

Conclusion. Through the years, oil and gas investors have been able to avoid corporate classification through adherence to Service rulings. (I.T. 3930, 1948-2 C.B. 126; I.T. 3948, 1949-1 C.B. 161). Such rulings outline the permissible scope of activity. It would seem that similar treatment should be accorded real estate investors; at least, for purposes of certainty the Service should set forth an approved area of operation. Even though it is not possible to use all oil and gas concepts in the real estate area, it is hoped that the Service will issue a definitive statement clarifying the area in which corporate liability in the real estate field will not be asserted.

1. A case is now pending in the Tax Court involving a California limited partnership. *Ben Lesser*, T. C. Docket No. 61148.

Activities of Sections

SECTION OF ADMINISTRATIVE LAW

The Section of Administrative Law will hold sessions of its 1957 Annual Meeting in both New York City and London. The sessions in New York will be held on July 11-13 and those in London on July 26.

New York Meetings. The Council and Committee Chairmen of the Section will meet on July 11 at the Waldorf-Astoria, with a morning session beginning at 10:00 o'clock and an afternoon session at 2:00 o'clock, with a luncheon at 12:30 and a social hour at 5:30 P.M. The general Section meeting will convene at 10:00 A.M. on Friday, July 12. Committee reports will be considered at the morning session. There will be a joint meeting of the Sections of Administrative Law and Public Utility Law, at 2:00 o'clock in the afternoon of July 12, on Administrative Procedure Problems. The guest speakers will be E. V. Rickenbacker, Chairman of the Board of Eastern Air Lines, selected by the Section of Administrative Law, and Philip M. Sporn, President of American Gas and Electric Company, selected by the Section of Public Utility Law. There will also be two member speakers, John W. Cragun, Washington, D. C., and Starr Thomas, counsel, A. T. & S. F. Railway Company, selected by the Section of Administrative Law and the Section of Public Utility Law, respectively. The chairmen for the joint meeting will be Harold L. Russell, for the Section of Administrative Law, and John B. Prizer, for the Section of Public Utility Law. Another general session of the Section of Administrative Law will be held on Saturday, concluding with the election of officers and council members.

London Meeting. On Friday, July 26, at 10:00 A.M. and 2:00 P.M. general Section sessions will be held in the Grosvenor House, London, with Harold L. Russell, Section Chairman, as general chairman, and Dean E. Blythe Stason, Chairman of the Section's London Meeting Committee, presiding. Ashley Sellers, Washington, D. C., Chairman of the American Bar Association's Special Committee on Legal Services and Procedure, will speak on "Administrative Proceedings and Problems of Administrative Law in the United States." A member of the British Bar to be announced, will speak on comparable problems in Britain. The Right Honorable Lord Justice Alfred Thompson Denning will discuss "The Judicial View of Administration in Britain". There will also be a panel discussion dealing with such subjects as Administrative Hearings, Confrontation of Parties with Evidence Against Them, the Administrative Court Idea, Judicial Review, and Problems of Legal Education in the Field. Members of the panel will be E. Blythe Stason, presiding, Professor L. C. B. Gower, Chairman of the Faculty of Law of the London School of Economics; Professor F. H. Lawson, Oxford University; Robert M. Benjamin, of New York City; and Whitney R. Harris, of Dallas, Texas.

SECTION OF CRIMINAL LAW

The New York-London meetings of the Association will culminate a major effort by the Section of Criminal Law. From time to time through the years, those who have worked with this Section have been inclined to feel that it stood as a faintly impoverished relation among its opulent and lustrous "bread-and-butter" counterparts. This month, however, when the Association turns its attention to British jurisprudence, its leaders expect their Section to shine like Cinderella at the ball.

Much of the color as well as much of the underpinning of our nation's most cherished protections and traditions centers in the British system of administering criminal justice. While the working of criminal law-enforcement at home has always been a subject of indifferent interest to most Association members, the Section confidently expects its program on the British system to appeal to everyone.

All members of the Association registered for the Annual Meeting will be furnished a combined program and guidebook with the compliments of the Section, featuring a parallel-column analysis of the American and English law-enforcement machinery and court systems. This will be supplemented by a half-day session the morning of July 12, at the Waldorf-Astoria in New York, where the Section will present a team of experts to "brief" Association members on British law enforcement.

The Section's meeting place in London, the Conference Hall of the London County Council, is itself an interesting landmark. Three formal sessions, Thursday morning, July 25, Friday morning, July 26, and Monday morning, July 29, will present leading British authorities to portray the administration of criminal justice, from the famous police work of New Scotland Yard to the equally famous trial procedures of Old Bailey and the amazingly swift and sure provisions for appellate review.

In conjunction with this program, arrangements have been made for Association members, in limited numbers, to visit the sacrosanct precincts of New Scotland Yard itself, and to have a look at the workings of a famous British prison, Wormwood Scrubbs.

On Monday, July 29, the Section will reverse the emphasis of its preceding programs and conclude its

program with a luncheon, at the Park Lane Hotel, to honor our British hosts who may be interested in the highlights of our American system of administering criminal justice. The speaker for this occasion will be Attorney General Brownell.

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

At the eight-state Regional Meeting of the American Bar Association held in Denver on May 10 and 11, 1957, the Section of Corporation, Banking and Business Law sponsored a panel discussion on "Financing for Mineral Development". Herbert F. Sturdy of Los Angeles, Vice Chairman of the Section, acted as moderator of the panel.

On May 11, the Board of Governors, acting upon the recommendation of this Section, adopted a resolution urging the enactment of H.R. 5195 or a bill of similar import. Sydney Krause, Chairman of the Bankruptcy Committee, and Milton P. Kupfer, a member of that Committee, have accordingly been authorized to appear before the Judiciary Committee of the House of Representatives to voice Association approval and support of the bill. The bill makes clear the distinction between statutory and consensual liens by adding a new subdivision 29 to Section 1 of the Bankruptcy Act. It also corrects the effect of *Matter of Quaker City Uniform Co., Inc.*, 238 F. 2d 155 (3d Cir. 1956), by eliminating the circuity of lien concept as applied in that case. In addition, it defines the Trustee's rights so as to exclude any fiction of "relation back" prior to bankruptcy and to exclude any added rights of a creditor extending credit at an earlier date thus overcoming the effects of *Conti* v. *Volper*, 229 F. 2d 317 (2d Cir. 1956), and *Constance* v. *Harvey*, 215 F. 2d 571 (2d Cir. 1954).

On May 13 and 14 in New York the Committee on Corporate Law Departments under the chairmanship of E. Nobles Lowe jointly sponsored with The Association of the Bar of the City of New York a program on problems peculiar to corporate law departments. Attendance at the sessions numbered 350, with representatives from 19 states, Canada and Venezuela.

In the evening on May 13, after an enjoyable buffet supper, Herbert B. Woodman, President of Interchemical Corporation, and Marvin Bower, Managing Director of McKinsey & Company, speaking as executives rather than as attorneys, advised the corporate attorneys present on "What the Executive Expects of the Corporate Law Departments". The differing points of view of the two excellent speakers served to illustrate that the approaches to the problem may be as varied as the corporate executives concerned.

Herbert Morton Ball, General Attorney of Johns Manville Corporation, presided over the concluding session on Tuesday morning, May 14. Walter L. Brown, General Counsel of Western Electric Company, spoke to the group on "Advising Management", summarizing his views on the proper role of the corporate counsel, both as his corporation's attorney and as a member of its management team. James W. Rodgers, of the New York Bar, spoke informatively on "Libel and Slander—As They Affect the Corporation and its Executives". Charles M. Spofford, of the New York Bar, delivered an address entitled "Changing Concepts of Corporate Responsibilities", pointing out the probable future relationship between the private corporation and the public. In future issues of *The Business Lawyer* it is hoped to bring to the Section's membership more of the substance of the interesting talks of these informed speakers.

SECTION OF ANTITRUST LAW

The Section of Antitrust Law will hold three sessions during the 1957 Annual Meeting in New York and London.

The first session will be held Saturday, July 13, in the East Foyer of the Waldorf-Astoria, beginning at 9:30 A.M. The nominating committee will make its report and new officers will be elected. The program will consist of a discussion of "Mergers and Acquisitions" by Bruce Bromley, speaking from the point of view of the private practitioner, and Robert Bicks, First Assistant in the Antitrust Division in the Department of Justice, giving the views of the government lawyer. Thomas E. Sunderland, of Chicago, the Section's Chairman, will discuss "Developments in Antitrust During the Past Year".

The next session will be held in London on Thursday, July 25, in the Ballroom at Grosvenor House. The subject will be "Extra-territorial Effect of the U.S. Antitrust Laws". Speakers will be Professor Kingman Brewster, of the Harvard Law School, Victor R. Hansen, Assistant Attorney General in Charge of the Antitrust Division of the Department of Justice, and Arthur H. Dean, of the New York Bar.

The third session will be a luncheon session, also to be held in Grosvenor House. Sir Hartley Shawcross, P.C., Q.C., M.P., Chairman of the General Council of the Bar of England and Wales, will address the Section on "English Restrictive Practice Legislation".

SECTION OF REAL PROPERTY PROBATE AND TRUST LAW

Joseph Trachtman, Vice Chairman of the Section, presided at the open meeting held in the Onyx Room of the Brown Palace Hotel, where Golding Fairfield, of Denver, led an informative discussion on "Title to Abandoned Railroad Rights of Way" and "Descriptions Related to Roads, Ditches, Lakes, etc." The speaker pointed out that there had been a difference of opinion among courts as to whether a conveyance of a right of way to a railroad creates a fee simple estate, or merely an easement so that abandonment of the road bed effects a reverter to the grantor. He cited a number of state statutes directed to-

(Continued on page 672)

OUR YOUNGER LAWYERS

Kirk McAlpin, Secretary and Editor-in-Charge, Savannah, Georgia

Circuit Bar Meetings Great Success

The Junior Bar Conference's Executive Council at its Mid-Year Meeting in Chicago emphasized the need for increased liaison between state and local groups and encouraged its realization through circuit meetings. Since that time, several successful circuit meetings have been concluded, notably in the Fourth Circuit, the widely publicized "Mountain and Plains" Meeting at Denver, the Sixth Circuit, and the Seventh and Eighth Joint Circuit Meeting.

The Fourth Circuit meeting was held on May 4 in Richmond, under the chairmanship of Council Representative R. Harvey Chappell, Jr., of Richmond; the States of Maryland, North Carolina, South Carolina, West Virginia and Virginia were represented.

Bert H. Early, Vice Chairman of the Junior Bar Conference, and Kirk McAlpin, Secretary, were present.

The following special reports were given: (1) "Relationship of Junior Bar Conference with the American Law Student Association" by William A. Forrest, Jr.; (2) "Junior Bar Conference Membership Admission Ceremonies, Luncheons, etc.", by John C. Kenny, of Richmond, State Chairman for Virginia; (3) "Traffic Courts Program: Visitor-Violator Project and the Vanderbilt Survey", by Raymond E. Callegary, of Baltimore, State Chairman for Maryland; and (4) "Jenkins-Keogh Legislation", by R. Harvey Chappell, Jr.

Reports were made from the states in the Fourth Circuit.

Raymond E. Callegary stated that Baltimore's "Visitor-Violator" program was all set and ready to go into operation. All of the women's clubs and the high schools have been lined up for active participation, and extensive television and newspaper coverage has been arranged. He reported that the Public Relations Committee of the Junior Bar Association of Baltimore City has a well-knit public information schedule, including the television program, "Court of Appeals".

Lawrence C. Johnson, of Aberdeen, delivered the report of North Carolina.

It was reported that South Carolina has only recently formed a Junior Bar Section, and plans are now under way for affiliation with the senior Bar of that state shortly. Forrest K. Abbott, of Cayce, heads an Executive Committee composed of Wendell McCrackin, of Charleston, J. Reese Daniel, of Columbia, Grady Kirven, of Anderson, Bruce Foster, of Spartanburg, John K. DeLoache, of Camden, and M. A. McAllister, of Dillon.

West Virginia is continuing a very active program of work.

Following the reports, a representative group of the younger lawyers of Virginia, after a lively discussion, passed a resolution which will be presented to the Virginia State Bar Association at its annual meeting in August, asking that a Junior Bar Section of the Virginia State Bar Association be established.

At the luncheon, Bert Early, the Vice Chairman of the Conference, spoke, particularly emphasizing the history of the Junior Bar Section and its value to the state bar and to the individual younger lawyers.

The Sixth Circuit held its meeting on June 2 at Cincinnati, with William C. Farrer, Chairman of the Junior Bar Conference, as a guest. Representatives of Kentucky, Michigan, Ohio and Tennessee attended.

The Joint Circuit Meeting of the Seventh and Eighth Circuits was held at Des Moines on June 7 and 8, in conjunction with the Annual Meeting of the Iowa State Bar Association. Co-Chairmen for the meeting were Bryce M. Fisher, Eighth Circuit Council Representative, Robert H. Geffs, Seventh Circuit Council Representative, and F. William McCalpin, Fifth and Eighth Circuit Council Representative.

F. William McCalpin, of St. Louis, explained the proposed plan for reorganization of the Junior Bar Conference. S. David Peshkin, of Des Moines, reported on the ever-increasing "ABA Membership Admission Program"; Pat Kelly on "American Law Student Association", and Thomas N. Tuttle, of Milwaukee, on "Local Unit Activities". Traffic Court Programs were also discussed extensively.

State reports were given by the chairmen—C. Severin Buschmann, of Indianapolis, for Indiana; Louis D. Gage, Jr., of Janesville, for Wisconsin; Harry M. Pippin, of Williston, for North Dakota; Joseph M. Butler, of Rapid City, for South Dakota; Edward Fride, of Duluth, for Minnesota; Robert G. Lowe, of Texarkana, for Arkansas; John C. Shepherd, of St. Louis, for Missouri; and Harry G. Slife, of Waterloo, for Iowa.

Waco JBC Presented Award of Merit

On May 31, Chairman William C. Farrer made the official presentation in Waco, Texas, of the JBC Award of Merit for the outstanding local Junior Bar unit to the Waco Junior Bar Association. This award was made at the 1956 JBC Meeting in Dallas, during the presidency of C. Cullen Smith, and was based on the unique program known as "Operation Bootstrap", which was designed to increase membership, meetings and social events of the Junior Bar Association; to establish minimum fee schedules, compile and print new legal forms and conduct a law institute for attorneys, and to inform

the public on the services of lawyers and extend service to the community through legal aid, lawyer referral, speakers' bureau, a "loan shark" committee, and a public relations committee.

Junior Bar Section of St. Louis

Under the chairmanship of Edward E. Murphy, Jr., the Junior Section of the Bar Association of St. Louis is stimulating interest among the younger lawyers by offering some down-to-earth, practical help on their problems. To do this, the Section has embarked on some unusual projects this year.

To take the guess work out of the rumor-shrouded question of lawyers' incomes, the Section sent out carefully prepared questionnaires to approximately 800 lawyers in the St. Louis Metropolitan area, all of whom were under the age of 36 and had received their licenses since 1948. The deans of the two local law schools considered this project so important that the cost was underwritten by them. The Section feels that this project will not only be valuable in helping young lawyers choose a career, but will also be of assistance to employers.

Two clinics have been operated this year to give younger lawyers help. The Office Law Clinic is designed for practice of a nonlitigational nature. Eight sessions, each presided over by a young lawyer well versed in the particular subject, have been held, each of a practical "how-to-do-it" type. Examples are drawn from smaller transactions with which a young lawyer may be faced, and plenty of forms are available at each meeting.

The Trial Practice Clinic, which was initiated by the Junior Bar Section a year ago, has been continued with increased interest. Six well attended sessions were held. Discussions were started by the young lawyers, but were completed by some of St. Louis' most able trial attorneys.

Florida Junior Bar Elects

The Junior Bar Section of The Florida Bar held its annual meeting at Miami on May 4. The following new officers were elected: President, Roy T. Rhodes, Jr., of Tallahassee; President-Elect, Richard C. Ward, of Miami; Secretary, Leon H. Handley, of Orlando; and Treasurer, William N. Avera, of Gainesville.

Committee reports were received and plans were made for the coming Institute on Practical Legal Education to be held at Stetson Law School in St. Petersburg in August.

State Chairmen at Denver Regional Meeting. (Left to right) Jack Verne Temple, of Denver, Colorado; Allen M. Swan, of Salt Lake City, Utah; E. E. Lonabaugh, of Sheridan, Wyoming; National Chairman William C. Farrer, of Los Angeles, California; Harry T. Goss, of Phoenix, Arizona; and William D. Curlee, of Oklahoma City, Oklahoma.

Thomas C. Carroll Receives Kentucky Award

At the Annual Meeting of the Kentucky State Bar Association, Thomas C. Carroll, of Louisville, 1955 President of the Kentucky Junior Bar Section, was presented the annual "Kentucky State Bar Association Outstanding Service Award", given each year to an attorney and a judge who have, in the opinion of a secret committee appointed by the President, rendered an outstanding service to the profession during the preceding year.

The award was made for work done by Carroll in supervising an economic survey designed to determine the need for a minimum fee schedule, and for subsequent work as chairman of a committee which successfully worked for the adoption of a minimum fee schedule for Kentucky, ultimately being approved by the Board of Bar Commissioners and printed and distributed to all the lawyers of the state.

Kansas Junior Bar Meets

On April 26, the State Junior Bar of Kansas met in Wichita. Payne H. Ratner, Jr. of Wichita, Tenth Circuit Executive Council Representative, attended and spoke briefly on the Junior Bar Conference and the Regional Meeting to be held at Denver.

The following officers were elected for the coming year: Chairman, Robert Thiessen, Wichita; Vice Chairman, James James, of Topeka; Secretary-Treasurer, B. G. Tudor, of Wichita.

North Carolina Younger Lawyers Section

Foremost among the projects sponsored by the Younger Lawyers Section of the North Carolina Bar Association, of which Ralph N.

Strayhorn, of Durham, is Chairman, is the preparation of a "Jurors Handbook" by a committee chairmanned by William Joslin, which has now been completed and approved by the Superior Court Judges of the state, Judge Pless, Chairman of the Judges Conference, having written a foreword for the "Handbook". Plans have been made for the publication of 10,000 copies for distribution to the courts of the state.

The Legal Internship Committee is working on the problem of further education by practical training. It held a meeting in Durham, at which time the "New Jersey Plan" for internship programs was studied and discussed. A report of the Committee, under the chairmanship of Don Evans, recommends that a three months' intensive summer skills course be required after graduation and passing the bar examination, followed by a six-months' internship program in a law office.

Under the leadership of Roger Hendricks, the Moot Court Competition for the Fourth Circuit was sponsored at the Wake Forest Law School last fall. It has been voted to sponsor this competition again during the coming year.

The Council of the Younger Lawyers Section is advocating that complimentary memberships in the North Carolina Bar Association be extended to all newly admitted lawyers who meet the requirements of the Association, such membership to extend to the next dues' paying period.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

ANTITRUST: John A. Duncan, of the Cleveland Bar, whose piece "The Big Case—When Tried Criminally" (4 *Western Reserve Law Review* 99) interested so many of us in that it discussed facets of criminal antitrust cases that the reviews seldom discuss, has found another phase of antitrust equally obscure—"Post-Litigation Resulting from Alleged Non-Compliance with Government Antitrust Consent Decrees" (8 *Western Reserve Law Review*, pages 45-56, December, 1956; address: Cleveland, Ohio; price: $1.25 per single copy).

Since there are over 400 outstanding civil consent decrees which have been entered into with the Federal Government since the Sherman Act was enacted, the *caveat* to defendants charged civilly with having violated the antitrust laws is not to rush in and "sign up" a consent decree which may eventually serve to haunt them the rest of their corporate days. Once a company consents to the terms of an antitrust decree, it must live with them from generation to generation and the sins of the fathers descend from decade to decade unto their guiltless corporate successors. Thus, years after a consent decree has been entered, some defendants have become embroiled in post-litigation instigated by the Government charging non-compliance, both civilly and criminally. So it behooves litigants originally charged with antitrust violations to pause and reflect before they permit themselves to be enjoined perpetually by a continuing decree of injunction directed to events to come. Touching on the modification as well as the enforcement of government consent decrees, this article should fill a real void for the practicing antitrust lawyer.

CONSPIRACY: Prosecution by the Government under the broad wording of Section 371 of Title 18 of the Criminal Code deserves careful and thoughtful study by all members of the legal profession. The section presents difficult problems to both prosecution and defense. The recent conviction of Gruenewald under this statute has excited considerable interest. The Second Circuit affirmed the conviction in a majority opinion by Medina, J., over a dissent by the late Jerome Frank. The Supreme Court has granted certiorari (25 U.S Law Week 3114, October 14, 1956) and we can expect a decision at the 1956-1957 term. George Spelvin in the December, 1956, *Columbia Law Review* (Vol. 56, No. 8, pages 1216-1227; address: Kent Hall, Columbia University, New York 27, New York; price: $1.50 per single issue) writes interestingly of the problems presented. To avoid the statute of limitations the government has three theories, "business as usual", "substantial installment", and "conspiracy to conceal" are the names Spelvin has for them. Each is a fascinating lawyer's problem. As icing on the cake when the defendant Halperin took the stand, the prosecutor was allowed to ask if he did not plead his Fifth Amendment privilege before the grand jury. On both the limitations point and the privilege point the Gruenewald case may make law. The Columbia note appears well done.

CORPORATIONS: Edward Ross Aranow and Herbert A. Einhorn, of the New York Bar, have an interesting and valuable article in the fall, 1956, issue of the *Cornell Law Quarterly* entitled, "Corporate Proxy Con-

tests: Expenses of Management and Insurgents" (Vol. 42, No. 1, pages 4-27; address, Ithaca, N. Y.; price $1.50) The article is part of a book to be published by the Columbia University Press entitled *Proxy Contests for Corporate Control.* It discusses the Fairchild Engine and Airplane (*Rosenfeld* v. *Fairchild,* 309 N. Y. 168, 128 N. E. 2d 291, 1955), the Thompson-Starrett Company (*Steinberg* v. *Adams,* 90 F. Supp. 604, 1950) and United Corporation (*Phillips* v. *United Corporation,* Civ. No. 40-497, S.D.N.Y., May 26, 1948, appeal dismissed 171 F. 2d 180, Second Circuit, 1948) proxy contests. Significantly, absent is any discussion of the New York Central proxy fight. The writers call for legislation to replace the case-by-case approach with its inevitable uncertainties and inconsistencies. For instance, the federal courts purport to follow the rule of the state of incorporation, yet Fairchild is a Maryland corporation and the litigation was decided by the New York state courts.

EVIDENCE: While judicial resistance to the social scientist's entrance into our courtrooms as an expert witness has been strong, modern developments indicate that this resistance is weakening. Jack Greenberg makes some pertinent observations on this development in an article recently published in the *Michigan Law Review,* "Social Scientists Take the Stand" (Vol. 54, No. 7, May, 1956). Concrete example provides the framework of Mr. Greenberg's discussion. For example, the use o. the social scientist's testimony to establish the coercive nature of distributing Bibles in schoolrooms, the injurious effects on teenagers of pornographic literature and motion pictures, and the results of public opinion polls provide focal points of the author's analysis. Of these, perhaps because it presents the most difficult problems, the use of the social scientist's testimony to put a public opinion poll in evidence is the most extensively discussed. As pointed out by the author, the public opinion poll as a fact-finding device is subject to many weaknesses. Aside from being expensive, it must surmount the standards that the courts set; but more serious than these is the hearsay objection. After citing several cases where the poll has been admitted through the use of social scientists' testimony, and one where the court indicated that a public opinion poll would have been helpful, the author reasons that ultimately the value of the public opinion poll will be recognized and its weaknesses overcome by its obvious value as a fact-finding device. The most significant aspect of this article, however, is the author's contention that the courts are coming to use the testimony of the social scientist as a basis for developing "judge-made" law. Pointing to the school segregation cases, where the Supreme Court relied on the testimony of social scientists to undermine and destroy the "separate but equal" doctrine, the author sees a significant impetus to the modern trend toward increased reliance on the social scientists' testimony. Recognizing that the social sciences do not have the precision of the physical sciences, the author indicates that the use of this kind of testimony is by its nature beset with problems. For example, what standards control the selection of experts, what weight is to be given the testimony, and, most perplexing of all, when the experts disagree in theory, what theory shall the courts adopt? Nevertheless, the author predicts that the proved value of this testimony, the increase in public law issues, plus the fact that lawyers themselves are developing greater confidence in the social scientists as a result of their undergraduate training, will cause the courts to place increased reliance on the testimony of the social scientist. Although Mr. Greenberg's conclusions are somewhat optimistic, it can hardly be questioned that his discussion will be helpful to the lawyer who seeks to bring the knowledge of the social scientist into the courtroom. (Reprints may be obtained by writing

the Michigan Law Review, Hutchins Hall, Ann Arbor, Michigan. price: $.50 per copy.)

REHEARINGS: Aimé Boucher was convicted in Quebec, Canada, for libel for publishing that in that province there existed a "burning natred of God and Christ and Freedom". In December of 1949, the Supreme Court of Canada reversed and ordered a new trial but two judges dissented, asking acquittal (1951) S.C.R. 265; (1950) 1 D.L.R. 657 and 96 Can. C. C. 48. Two new judges were added to the Court. A motion for rehearing followed and by a five-to-four vote acquittal was directed (*Boucher* v. *The King,* 1951, S.C.R. 265; 1951, 2 D.L.R. 369 and 1951, 99 Can. C.C. 1). Because of this unusual decision by Canada's highest court, *The Canadian Bar Review* asked Professor Ronan E. Degnan, of Utah Law School, and Professor David W. Louisell, of California Law School, to write for the *Review* a study of "Rehearings in American Appellate Courts". This they did, and it is published in the October, 1956, issue of *The Canadian Bar Review* (Vol. 34, No. 8, pages 898-938; price not stated; address: The Editor, G.U.U. Nicholls, Q.C., at 1390 Sherbrooke St. W., Montreal 25, Quebec, Canada). A very valuable discussion of the rehearing practices of our state and federal courts it is. Interesting things were discovered. Forty-five of our forty-eight states provide by court rule for a rehearing, and only Maine provides no opportunity. Usually the rule requires you to apply within a certain time, but *Cahill* v. *New York, N. H. and H. R. Co.,* 351 U. S. 183, 76 S. Ct. 758 (1956), under the guise of a "motion to recall and amend the judgment", permitted "what was in substance a second petition for rehearing". Rehearings take place in some of our federal Courts of Appeals en banc, that is before all the Judges after a panel of three Judges decides a case in a manner that may not please all the Judges. The District of Columbia Circuit and the Court of Appeals for the Third Circuit have been "relatively free" with granting rehearings en banc. The Watkins case on the 1956-1957 Supreme Court Docket (#261) is a recent example of a case where the District of Columbia Circuit sitting en banc reversed one of its panels. Curiously, the Second Circuit Court of Appeals has "never convened en banc for any purpose" even though the Supreme Court in *Western Pacific Railroad Corp.* v. *Western Pacific R. R. Co.,* 345 U.S. 261, in leaving to each circuit the discretion how to exercise the en banc rehearing privilege, said "that so 'necessary and useful' a power could not be ignored". However, to the deep regret of most of the bankruptcy Bar, the same panel of the Second Circuit did grant a rehearing and reversed itself in *Constance* v. *Harvey,* 215 F. 2d 571. More recently Mr. Justice Brennan has replaced Mr. Justice Minton, and in the *Covert* and *Krueger* cases (June 11, 1956, 24 U.S. Law Week 4315 and 4317 and November 6, 1956, Docket numbers 701 and 713, 25 U.S. Law Week 3136) in October, 1956, the Solicitor General was directed to reply to the petitions for rehearing. Apparently the prevailing custom is not to answer such petitions but let the Court defend itself. In November, 1956, rehearing of both cases was directed by six Justices, Mr. Justice Harlan and Mr. Justice Brennan joining the Justices who dissented in the same cases in June, 1956. Mr. Justice Brennan, of course, replaced Mr. Justice Minton who (along with Mr. Justice Harlan) was one of the five Justices that in June in these cases upheld the right of the services to court-martial camp followers. From all of which we can see that this study of rehearing techniques ought to be of great value to every lawyer who loses when he thinks he should have won and he wants to gamble a petition for rehearing. [EDITORS NOTE: On June 10, the Court reversed its 1956 holdings in these cases, Mr. Justice Brennan joining the dissenters to the 1956 decision. Mr. Justice Frankfurter and Mr. Justice Harlan wrote separate concurring opinions.]

BAR ACTIVITIES

Charles Ralph Johnston • Editor-in-Charge

Baya M. HARRISON

Phil Graham

The first session of the 1957 Annual Meeting of The Florida Bar convened on May 2 in Miami Beach, with President J. Lance. Lazonby, of Gainesville, presiding. This was the fifty-first annual gathering of Florida lawyers and the seventh since the integration of The Florida Bar.

The newly elected officers are Baya M. Harrison, of St. Petersburg, President, and O. B. McEwan, of Orlando, President-Elect. Kenneth B. Sherouse, Jr., of Tallahassee, was reappointed Executive Director. New members of the Board of Governors are Joe J. Harrell, of Pensacola; Herbert F. Barry, of Lake City; Ronald J. Bradshaw, of Inverness; Richard T. Earle, Jr., of St. Petersburg; Douglas Stenstrom, of Sanford; Heskin A. Whittaker, of Orlando; Reginald L. Williams, of Miami; Ralph C. Bell and Donn Gregory, both of Tampa; and Roy T. Rhodes, of Tallahassee *ex officio* as president of the Junior Bar Section.

President Lazonby, after reporting on the activities of The Florida Bar during the year, made these recommendations: (1) That a full-time general counsel be employed to supervise the investigation and prosecution of disciplinary cases and to assist the Committee on Unauthorized Practice of Law; (2) That The Florida Bar continue to urge the adoption of a system of selection that will remove judges as far as possible from the burden and influence of political pressures, and assist and support the recommendations of the Judicial Council of Florida; (3) That more emphasis be placed on state wide institutes, utilizing the talent within the state and the services available at the universities; (4) That each local bar association consider taking the necessary steps to change its administrative year to coincide with that of The Florida Bar, thus rendering the Council of Local Bar Presidents a more effective agency through which better co-ordination of the programs of The Florida Bar and of local Bars would result.

President David F. Maxwell of the American Bar Association was the principal speaker at the luncheon meeting and outlined the activities of the American Bar Association on group insurance, the Jenkins-Keogh Bill, the improvement of federal administrative procedures and the rights of lawyers in federal service.

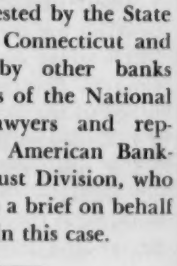
The second day of the meeting, May 3, was devoted to reports of committees and luncheon meetings of the Tax Section, the International and Comparative Law Committee, the Florida Council of Bar Presidents and the Real Property, Probate and Trust Law Section.

Associate Justice Tom C. Clark of the Supreme Court of the United States addressed the final session of the meeting on the subject of "Judicial Roadblocks".

The principal speaker at the Annual Banquet was Mr. Justice G. A. Gale, of the Supreme Court of Ontario, Canada.

At the request of the Committee on Unauthorized Practice of the Law, the Board of Governors of the American Bar Association has authorized the filing on behalf of the Association of an *amicus curiae* brief in the injunction action brought by the State Bar Association of Connecticut against The Connecticut Bank & Trust Company and the Hartford National Bank & Trust Company, seeking to restrain the banks from alleged unlawful practice of law. The Superior Court of Hartford County on April 15 rendered a decision partly in favor of the banks. The State Bar Association of Connecticut will take an appeal to the Connecticut Supreme Court of Errors for final determination.

Chairman Thomas J. Boodell, of the American Bar Association's Committee on Unauthorized Practice, in presenting the Committee's recommendation to the Board of Governors, stated that the two banks sent non-lawyer employees into court to represent them in the probate of estates. The banks assert that, when they are acting as fiduciaries, they have the same right as corporations to represent themselves and therefore need no lawyer. This assumption is contested by the State Bar Association of Connecticut and is not accepted by other banks which are members of the National Conference of Lawyers and representatives of the American Bankers Association, Trust Division, who will be asked to file a brief on behalf of the Conference in this case.



Aronhold C. SCHAPIRO

Hyland's Studio

The 77th Annual Meeting of the Ohio State Bar Association was held in Columbus on May 16, 17 and 18 with almost 1200 of the Association's 8,873 members registered. President Earl F. Morris, of Columbus, presided.

Mr. Morris in his annual address listed the accomplishments of the Association during the past year as

follows: (1) The promulgation by the Supreme Court of Ohio of Rule XXVII, the new disciplinary rule, thus bringing to fruition several years of work by the Association; (2) The adoption by the Association and the Ohio State Medical Association of a model statement of principles of relations between lawyers and doctors, the primary objective of which is to facilitate the obtaining by the lawyer and the furnishing by the doctor of medical reports and testimony; (3) The expansion of the institute program in an effort to obtain the better coordination of the work of the Ohio State Bar Association, local bar associations and the law schools in continuing legal education; and (4) The addition of 487 new members as a result of a membership campaign.

The following officers were elected to serve during the coming year: Aronhold C. Schapiro, of Portsmouth, President; and William R. Van Aken, of Cleveland, Vice President; New members elected to the Executive Committee are Lawrence R. Lytle, of Cincinnati; Eugene Howard, of Toledo; and John C. Johnson, Jr., of Wooster. Joseph B. Miller, of Columbus, is the Secretary-Treasurer of the Association.

Institutes were held on workmen's compensation, secured transactions, unauthorized practice, federal income taxation, condemnation, trial practice, zoning and annexation, collections and legislation.

Out-of-state speakers included U. A. Gentry, of Little Rock, Arkansas, on "Litigation Against Trust Companies in Unauthorized Practice"; and Perry A. Nichola, of Miami, Florida, on "Personal Injury Litigation—Making and Handling the Claim". The principal speaker at the annual banquet was James F. Byrnes, former Governor of South Carolina, whose subject was "Can Local Governments Survive?"

The 19th Annual Meeting of the Virginia State Bar was held in Roanoke on May 10 and 11 with over two hundred members present. Pres-

Robert E. TAYLOR

ident E. Ralph James, of Hampton, presided. The meeting was held in conjunction with a meeting of the Judicial Conference of Virginia at which a proposed rule of court to have judges in Virginia comment on evidence in jury cases was discussed.

The officers elected to serve the State Bar during the coming year are Robert E. Taylor, of Charlottesville, President; James H. Simmonds, of Arlington, President-Elect; and Russell E. Booker, of Richmond, Secretary-Treasurer, who was re-elected. Marshall S. McClung, of Salem, was elected to serve on the Executive Committee of the Council, which is the governing body of the organization. The new officers took office on July 1.

Action was taken upon a number of recommendations of the Joint Committee on Legislation and Law Reform including the following: rejected a proposal to put the doctrine of comparative negligence into the Virginia Code; adopted a minority report of the Committee recommending that insanity not be made a ground for divorce in Virginia; accepted a recommendation that the remuneration of court-appointed counsel in capital cases should be at the rate of $25.00 per diem for preparation and trial with reimbursement of actual expenses where approved by the court, the total not to exceed $150. Another important action was the endorsement of the Jenkins-Keogh Bill by the passing of the following resolution:

> Be It Resolved, That the Virginia State Bar, in annual meeting assembled, expresses its considered approval of the legislation now pending in the House of Representatives of the Congress of the United States under the designation of H. R. 10, known as the Jenkins-Keogh Bill, and urges that this legislation receive the unqualified support of the Virginia representatives in the Congress of the United States;
>
> Be It Further Resolved, That a copy of this resolution be sent to each of the members of the House of Representatives from the Commonwealth of Virginia, and to each of the Senators from Virginia, with the request that they make every effort to secure the passage of this legislation.

Among the speakers were Lewis A. McMurran, Jr., of Newport News, who gave an interesting account of the coming celebration of the 350th anniversary of the settling of Jamestown, and John R. Detmore, Chief Justice of the Supreme Court of Michigan, who was the principal speaker at the Annual Banquet.

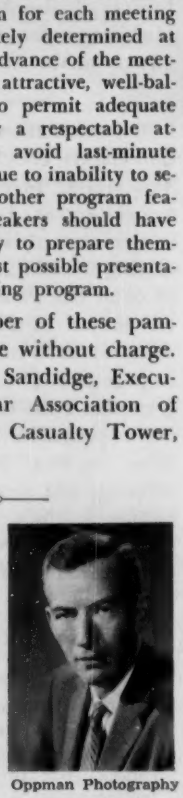
The manual for local bar association officers, entitled *Your Local Bar Association*, prepared by the Bar Association of Tennessee, seems to us to give many suggestions for stimulating interest among the members of small bar associations, which was the subject of a small item in this department in our June, 1957, issue at page 559. The manual has a program check list for local bar association programs and contains sections on local bar administration, meetings and programs, professional service, public relations and bar cooperation. We quote three paragraphs from this interesting publication:

> Local bar executives should not be discouraged by a relative lack of numbers in the membership of their associations. Several of the most effective local bar associations in Tennessee have less than 25 members, and conduct full programs of organized bar activities. A study of the suggestions here following will indicate that there are many opportunities for small groups of lawyers to render valuable public and professional service in their communities. Their programs of activities, not the numbers of their members, measure the effectiveness of local bar associations and their influence and prestige in the eyes of the general public. With good leadership and creative planning, any group of lawyers can make an outstanding record.
>
> Regular, attractive meetings can do more than any other activity to stim-

ulate the interest and support of lawyers in the activities of a bar association. Regularity should be the prime essential of the meeting schedule. Meetings should be held at least monthly, preferably at the same hour on the same week-day. Combining meetings with luncheons or dinners encourages attendance for enjoyment of the social fellowship of the dining hour. Meals should be good, well prepared and quickly served, and reasonably priced. Meetings should start promptly at the hours scheduled and adjourn promptly at an agreed and early hour.

The program committee should work in cooperation with the officers of the association to prepare a tentative program schedule for the entire year. The program for each meeting should be definitely determined at least a month in advance of the meeting, to assure an attractive, well-balanced program, to permit adequate publicity to draw a respectable attendance, and to avoid last-minute disappointments due to inability to secure speakers or other program features desired. Speakers should have ample opportunity to prepare themselves for their best possible presentation on the meeting program.

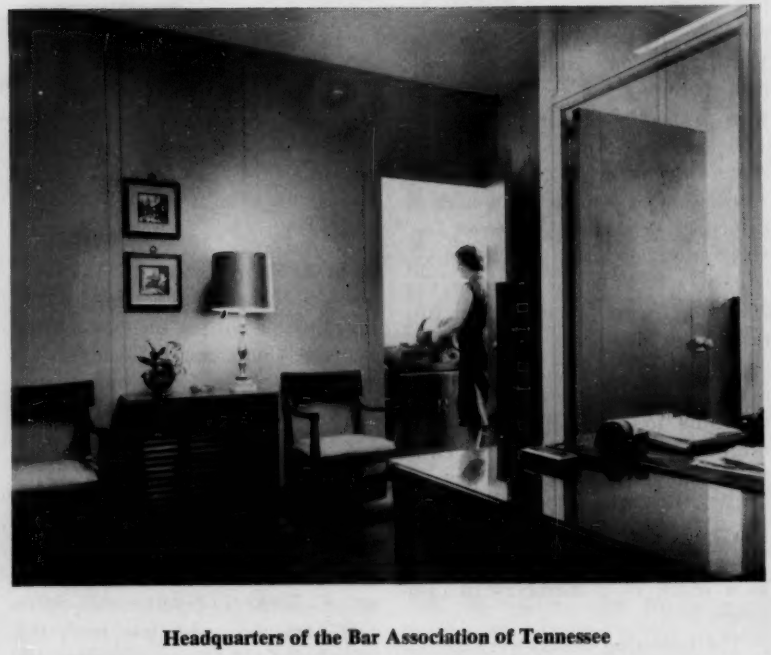
A limited number of these pamphlets are available without charge. Write to John C. Sandidge, Executive Secretary, Bar Association of Tennessee, Life & Casualty Tower, Nashville.



John C. SANDIDGE

Oppman Photography

The Bar Association of Tennessee moved its offices to the new thirty-story Life & Casualty Tower in Nashville on April 1. Although the Association was organized in 1881 and celebrated its Diamond Jubilee at its annual meeting last June, it did not have an official headquarters or a paid executive until 1952 when John C. Sandidge was elected Executive Secretary and two rooms were obtained in the Third National Bank Building in Nashville as a headquarters office. At that time about 1600 of Tennessee's slightly over 3000 lawyers were members of the Association. At the end of 1956 about 2400 were members of the Association.



Headquarters of the Bar Association of Tennessee

The Association secured three rooms in the new building, one of which is used as a supply and mailing room and contains mimeographing, addressographing and folding equipment, as well as a mailing machine. With these facilities it is no longer necessary to send work to letter shops. The Nashville offices of the New York Life Insurance Company are on the same floor and this company has offered the use of its conference room for committee meetings and other small gatherings of the Association.

The present annual dues of $5.00 for those licensed five years or less and $10.00 for senior members do not provide enough money for many activities the Association wants to undertake, and an increase to $7.50 and $15.00, recommended by the Budget Committee and the Committee on Constitution and By-Laws, was scheduled to be put before the annual meeting on June 13-15. If the increase is approved, the publications and public relations programs will be considerably expanded. The Association publishes the *Tennessee Lawyer,* giving news of interest to the lawyers and judges of Tennessee, and *The Tennessee Law Review,* the latter in collaboration with the Law School of the University of Tennessee at Knoxville. Weekly bulletins on legislation are furnished to all members of the Association during the sessions of the Tennessee General Assembly, followed by a final summary of all new laws after adjournment of the Assembly. Another worthwhile publication is a manual for local bar association officers entitled "Your Local Bar Association", which contains ideas for the organization, administration, meetings and programs for stimulating interest in even the smallest local groups.

The Association administers a group life, hospital and surgical insurance program involving over 600 lawyers and their employees.

In its new headquarters, the Bar Association of Tennessee expects to increase its services to its members and looks forward to a growth in membership.

James P. McCUNE

Over three hundred members of the Utah State Bar attended its 26th Annual Meeting in Salt Lake City on May 7 and 8, with President A. H. Nebeker, of that city, presiding.

James P. McCune, of Nephi, will serve as President during the coming year, and Ira A. Huggins, of Ogden, as Vice President. L. M. Cummings, of Salt Lake City, is the Secretary of the State Bar. Newly elected members of the Board of Commissioners are O. Dee Lund, of Brigham City, and A. Pratt Kesler, of Salt Lake City.

Out-of-state speakers were David F. Maxwell, President of the American Bar Association; Professor Harry Kalven, Jr., of the University of Chicago Law School, whose topic was "Inside the Jury Room"; and Joseph Trachtman, of New York City, who discussed "What's Wrong with Your Trial Tactics?"

Milton T. LASHER

Charles Studio

The New Jersey State Bar Association held its 59th Annual Meeting on May 16-18 in Atlantic City, with President Robert S. Snevily, of Westfield, presiding.

Elected at the sessions were Milton T. Lasher, of Hackensack, President; Marshall H. Diverty, of Camden, President-Elect; John R. Kelly, of Jersey City, First Vice President; Theodore J. Labrecque, of Red Bank, Second Vice President; Douglas M. Hicks, of New Brunswick, Treasurer; and Emma E. Dillon, of Trenton, Secretary.

The Association approved integration of the Bar and the report of the Committee on Integration will be sent to each member of the Bar of the state with a request for his vote on integration. If a majority are in favor, a petition for integration will be presented to the Supreme Court.

A proposal to adopt the principle of comparative negligence, as opposed to the present rule of contributory negligence, was defeated. An exhaustive report of the Junior Section recommending the creation of a federal Public Defender Office and the establishment of a public defender system on a trial basis in two counties was adopted.

Associate Justice William J. Brennan, Jr., was the speaker at the Annual Dinner, where he was awarded the State Bar Association's Gold Medal for distinguished service to the Association and the public. The presentation was made by Chief Justice Arthur T. Vanderbilt.

President Thomas M. Raysor of The Bar Association of the District of Columbia, (right) accepts plaque from Paul E. Wampler, Commander of the District of Columbia Department, Veterans of Foreign Wars, for "special achievement" in aiding the community through promoting a legislative program in the fields of garnishment, divorce laws and revision of the District of Columbia Code. The award was made for achievement during the 1956-1957 year and presented at the Annual Meeting of The Bar Association of the District of Columbia, on June 11, 1957.

J. Davis KERR

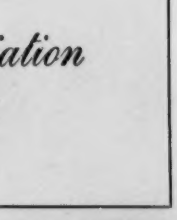
The South Carolina Bar Association's 63d Annual Meeting was held in Greenville, South Carolina, on May 2, 3 and 4, with an attendance of over three hundred members. President David W. Robinson, of Columbia, gave an account of the activities of the Association including its efforts in behalf of the establishment of a Judicial Council in South Carolina, which was accomplished on an interim basis by court order in July, 1956, and on a permanent basis by legislation enacted in February, 1957. Mr. Robinson also reported on the Association's participation in studies of

congested court calendars, and in an increase in the salaries and retirement income of the members of the state judiciary.

J. Davis Kerr, of Spartanburg, took office as President, and Frank H. Bailey, of Charleston, was chosen President-Elect. William F. Prioleau, Jr., of Columbia, was re-elected Secretary-Treasurer. New members of the Executive Committee are John W. Thomas, of Columbia, and Frank H. Bailey, of Charleston.

Over 500 members and guests heard an address by President David F. Maxwell, of the American Bar Association, at a luncheon session.

Chief Justice Taylor H. Stukes, of the South Carolina Supreme Court, reported to the Association on the new Judicial Council of South Carolina. Speakers at the annual banquet were Judge Clement F. Haynsworth, of Greenville, a member of the Fourth Circuit Court of Appeals, and Justice Lionel K. Legge, of the South Carolina Supreme Court.



Carl K. NELSON

Kislek Photographers

Over five hundred members of the Georgia Bar Association attended its 74th Annual Meeting in Savannah on May 30 and 31. President Howell Hollis, of Columbus, presided.

Newly elected officers are Carl K. Nelson, of Dublin, President; William T. Dean, of Conyers, Vice President; J. Wilson Parker, of Atlanta, Treasurer; and Maurice C. Thomas, of Macon, Secretary. Mrs. Grant Williams, of Macon, was reappointed Executive Secretary. Wingate Dykes, of Americus, and C. Baxter Jones, of Macon, were re-elected to represent the Georgia Bar Association in the House of Delegates of the American Bar Association.

The principal speakers and their subjects were Congressman E. L. "Tic" Forrester, of Leesburg, "Civil Rights Bills"; Thomas F. Lambert, Jr., of Watertown, Massachusetts, "Recent Developments in Tort Law"; and Josh H. Groce, of San Antonio, Texas, "The Preparation and Trial of a Tort Case from the Defense Viewpoint". Judge J. Harold Hawkins, of the Supreme Court of Georgia, discussed "The Changes in Appellate Procedure" which were adopted by the General Assembly at its 1957 session and became effective on July 1. Judge James G. Stewart, of the Supreme Court of Ohio, was the speaker at the Annual Banquet.

John A. Cardon's speech before the Ohio State Bar Association on **Profit Sharing Plans for Small Corporations,** which appeared in the June 25, 1956, issue of THE OHIO BAR, and was reviewed in this department in the August, 1956, issue (page 788), has been reprinted as the American Bar Foundation's Reproduction Series No. 2, at 50 cents a copy. Order from the Cromwell Library, American Bar Foundation, 1155 East 60th Street, Chicago 37, Illinois.

Administrative Law in Great Britain

(Continued from page 623)

with the growing power of the state, the extension of such a jurisdiction is inevitable. He suggests, as a remedy, that a special court be set up to control the activities of administrative officials. He points out that this is the function of the French *Conseil d'Etat*, and recommends that body as a model for a similar court in Great Britain. Many concede that, if an adminstrative jurisdiction must be accepted as a necessary part of the planned economy, a court with an overriding authority, such as Professor Hamson suggests, can be some check on arbitrary power. But was the great Dicey wrong when he praised British law for being free from a separate administrative jurisdiction?

The fact is that the British legal system, which reached its highest development in the nineteenth century, is the product of a civilization which based its economic activities on "the freedom of the individual". Its traditional courts are concerned wholly with the rights of the individual, and not at all with the efficient working of the economic system. They are, in consequence, unsuited to enforce the vast accumulation of new regulations made necessary by the modern ideas of economic planning.

Where, in Eastern Europe, the economic system is wholly planned by the state, the rule of law—as it was conceived by Rome, and developed by Western civilization—has been completely destroyed. Its place has been taken by the wide discretionary powers of the state official.

In Great Britian, state economic planning as yet controls the producers only in a small section of the total economy, but it is already clear that the right of access of these producers to the traditional courts must be curtailed. If the planning of the economy is allowed to extend into new fields, we can only conclude that the jurisdiction of the High Court will be correspondingly limited, and Great Britain will have substituted for her traditional legal system, concerned only with justice, a new system of law concerned primarily with the efficient working of the economy, according to the ideas of the Government in power.

Dicey's conception of the rule of law under the one centralized authority of the High Court was perfectly sound, but it would appear that it is only applicable to a free economy. The question is: Can the rule of law survive in a state-planned economy?

Government Contracts

(Continued from page 608)

new field in our jurisprudence. While its fundamentals go back to the last century, its principal growth and development have taken place since the beginning of World War II. As a result, and as is usually the case with new fields of law, the dissemination of adequate written material describing its principles and procedure has simply not kept pace with the business activity and friction in the field. Accordingly, newcomers in the legal profession now have difficulty trying to understand what the subject is all about, and the Bar as a whole has apparently not had the facilities to become sufficiently informed to advise clients generally on their problems in this field. Indeed, the Bar simply cannot advise contractors in this area unless it has the necessary written material adequately available. Thus, the need for a more adequate distribution of written material in the field of government contract law has been an urgent one until recently. Perhaps the most urgent need has been with regard to the decisions of the Armed Services Board of Contract Appeals. Until recently, only a limited number of copies of these decisions were published in mimeographed form, and selected opinions were distributed in a commercial service. But these decisions, vital to the operations of a contractor with the Government and well known to Government counsel, were simply not generally available to the Bar. Fortunately, arrangements have now been made with the commercial publisher to print these opinions complete with headnotes in a manner comparable to the reported opinions of the courts and leading administrative tribunals. It is my hope that these opinions will now be made available in leading law libraries throughout the country, and through them to the Bar generally and to Government contractors, particularly small business. In addition, the Office of the General Counsel for the Navy is engaged in revising *Navy Contract Law*, the first edition of which was issued in 1949. The new edition will be made available to the public through the Government Printing Office sometime in 1957.

All in all, if education on the legal rights and obligations of Government contracts can be furthered so as to reach the many quarters where this education is so badly needed, small business will be much better able to participate in Government procurement, and the Government's whole procurement program will be able to proceed with that smoother and more precise performance which will necessarily result from a clear understanding and a minimum of friction with contractors.

Professional Trade Secrets
(Continued from page 630)

since he wasn't sure whether it was a ball or a strike, he might as well call it a two-base hit.

There are a few cases in which the illusion of judicial infallibility may be temporarily suspended. In cloistered law classes, for instance, professors may express mild doubt concerning the correctness of an occasional opinion—for the purposes of teaching only. Judges of lower courts when reversed by the appellate court may disclose to their wives, and possibly a few close friends, that the upper court was wrong—a historical professional courtesy, undoubtedly. Lawyers, when out of earshot of laymen and tattlers, may express doubt about the correctness of one decision—or possibly two, but not over three—provided no improper language is used. If 51 per cent of the lawyers think that the court was right, there is a 95 per cent chance that the court was right; but if 75 per cent of the lawyers think that the court was wrong, there isn't any chance that the court was right. Still, for the ultimate good of the profession lawyers cannot publicly castigate judicial opinions—that special privilege is strictly reserved for a few newspapers and all authors of case notes in law reviews.

Illusion No. 5: Everything said in court opinions is important.

Any lawyer who soberly—or otherwise—suggests to a non-lawyer that a single w[illegible]n a court opinion is unim[illegible]d imperil the en[illegible]judici[illegible]n. The non-lawyer might naïvely ask, "Why did the court write such a fantastically elongated opinion if all of it wasn't important?" Taking a hint from the courts, the lawyer should neither hear nor answer the question; but if an answer is coerced, it should be that courts are frequently so overburdened that they haven't time to write concise opinions. It takes more time to take off excess weight than it does to put it on. If people generally got the idea that portions of a court's opinion were unimportant, they'd invariably pick out the wrong portions as unimportant—and chaos or contempt proceedings would follow. The only safeguard is massive cultivation of the illusion that the mere fact that the words issue from the courts confers profound importance upon every one of them—even though the last one takes a small eternity to get there.

The remarkable thing is not that opinions sometimes contain the irrelevant, the immaterial, the trite, but that they contain so little of the inutile, the inane, the obscure. Courts do not have the privilege of spending as much time in research, study and thought on each controversy as the practicing lawyer must devote to the proper presentation of his case. Courts must decide swarms of controversies, and they must decide promptly. Occasional incorrectness is not too great a price to pay for the expeditious disposal of litigation. When courts decide, they must assign some reason in writing, primarily to avoid the accusation of capriciousness. It is, of course, much easier to reach a decision than to explain to one's self or to others the basis of the decision. Conscientious judges sometimes mar their excellent decisions by their attempts at explanation. Theoretically an opinion is a record of the mental processes leading to a certain result; actually, it may be an attempted justification of a sound conclusion—or, at least, a conclusion. Lawyers and judges will never agree as to what is and what is not important in opinions, because the lawyer in reading an opinion is interested primarily in what the court did and the judge in writing the opinion is interested primarily in explaining why he did it. However, so far as humanity is concerned the presence of the unimportant in judicial opinions is nothing momentous, for judicial opinions generally fall within the category of esoteric literature—that is, stuff understood by or meant for a select few.

In one sense, everything said in opinions is important because everything contributes to the revelation of the personality and mental processes of the writer. No judge can write anything except as an individual human being, and everything he writes reflects his heredity, his environment, his hobbies, his aversions, his predilections. In every controversial question the ultimate determination must result from the totality of personality. Hence clues to a judge's personality, as revealed in his opinions, may disclose what type of argument he is allergic to, what type he has developed complete immunity to, and what type he thoroughly enjoys lapping up.

Illusion No. 6: Precedents enable a lawyer to predict what the courts will do next.

If lawyers ever lose their capacity for believing that precedents enable them to predict what the courts will do in the future, they would advise their sons to study dentistry or plumbing or some other respectable and highly remunerative profession. A lawyer would experience only frustration from his practice if candor compelled him to advise his client: "The courts held this way last month, but heaven only knows how they'll hold next month!" And the bewildered client —what would he do? Probably seek a lawyer with more illusions or less candor.

While precedents should serve as a basis for an intelligent guess, their complete reliability for accurate

prediction would be precursory to the end of jurisprudence. The lifeblood of a healthy, vigorous, growing legal system is reasonable unpredictability. Law is the servant of mankind, but the law that served mankind yesterday may afflict mankind tomorrow. Law to be helpful must change as the world changes—with the customary judicial lag, of course. Courts rely upon two standard methods, both involving the utilization of precedents, for stimulating the growth of law in the right direction: (1) pumping new meanings into words used in old opinions, and (2) fabricating fine distinctions.

The pumping method is foolproof: all the court need say is that an opinion written fifty years ago indubitably had the present controversy in mind and had reached the correct solution—and who can prove otherwise? Shakespeare would have made the world's greatest appellate judge, because of his genius for using words susceptive to never-ending pumping with new meanings by never-ending generations. That is why Shakespeare may safely be quoted as an authority on most subjects even today!

The fine distinction method is difficult, because the fabricating process is subject to public scrutiny. Fine distinctions, like slight differences, lead to violent controversies; people always save their intolerance and violent prejudices for slight differences. The difficulties in the use of the method have not impeded its primary function—to correct past errors without admitting that errors have been made. When a lawyer essays a curbstone opinion, he'll argue for hours in support of his untenable position rather than admit a blunder. It is just as painful for judges as for lawyers to admit mistakes, but there is this difference: judges dare not admit mistakes without destroying the essential illusion of infallibility. Instead of admitting past mistakes, they distinguish prior opinions.

Precedents, strange as it may seem, have tremendous therapeutic value to the courts. Anyone entrusted with power or authority becomes susceptible to the occupational disease resulting from the *divinity virus*. The disease resulting from that virus is thoroughly enjoyed by the victim, but not by his friends. The disease is never fatal—unfortunately. There is no preventive serum, and the only known palliative is a massive dose of humility. Courts perform valiant service in keeping the *divinity virus* under control in boards, commissions and public officers; but if the virus should be transmitted to the judiciary, the remedy must be self-administered—and it consists of reading past adjudications concerned with limitations on judicial authority. If that doesn't help—let us pray!

Illusion No. 7: The meaning of statutes is determined by the rules of statutory construction.

When ill-considered, unwise and unintelligible legislation accomplishes its destiny by getting involved in litigation, what would the juridical Emily Posts advise? Should the courts audaciously repeal or amend the law, giving as their reason that the legislation as enacted was meaningless and stupid besides? All agree that would be in extremely bad taste —almost vulgar, in fact. The same highly desirable results may be suavely accomplished by invoking the illusion that the meaning of statutes is determined by the rules of statutory construction.

The first step is the customary pronouncement that it is the function of the court to ascertain the legislative intent. Since, however, it is impossible for a legislative body to have any intent as a body, the search for the nonexistent intent would require, not an illusion, but a hallucination. The next step is a determination of what modifications, additions and deletions are required to make the law useful and workable. The next step—well, judicial legislation is an essential, beneficent function of the courts, provided it isn't called that. While the term "judicial legislation" is considered indecent, the act itself is highly regarded. The final step is the application of the rules of statutory construction. Those rules can't do anything by themselves, any more than a carpenter's tools can build a house by themselves; moreover, there are so many inconsistent, conflicting rules that they'd do nothing except fight among themselves. In the hands of a skilled jurist, however, the rules can accomplish miracles! The rules of statutory construction may be defined as the paint which the courts skillfully apply to conceal judicial repair jobs on defective legislation.

Illusion No. 8: Briefs and oral arguments win cases.

If lawyers didn't believe that briefs won cases, they wouldn't write any; if they didn't believe that oral arguments won cases—they'd make them anyhow. Any illusion that promotes the preparation of good briefs certainly deserves cultivation.

The courts are presumed to know the law; hence briefs, while useful in presenting the facts, are unnecessary for enlightening the courts on the law. Briefs are useful, not to win cases but to save the courts from the drudgery of finding and collating cases and arguments which the courts might deem useful or necessary to support their decisions. Sometimes it is a mistake to include in a brief only those arguments that seem sound to the lawyer; the lawyer's judgment could be defective, or the court might prefer a specious argument. Apparently courts have inherent power to make a specious argument legitimate by adoption. Brief writing always involves the hazard of including too much or too little. Usually the lawyer errs grievously in the direction of including too much, but on rare occasions he goes to the other extreme in assuming that the courts know the obvious. Of course, what seems obvious to the lawyer who has lived with a problem for months may remain a secret from a court which has time to acquire only a nodding acquaintance with the problem.

There may be some question as to whether the illusion that oral arguments win cases is good or bad—in fact it may be a delusion—but it probably has the most durability of all illusions. Oral arguments are useful in saving the courts the search and puzzlement involved in ferreting out the issues in the controversy, but oral arguments can't change the law and they can't change the facts. The general level of oral arguments could be improved if certain standard types could be exterminated: (1) the type that derives its entire persuasiveness from noise; (2) the type that seeks to convince the court by inducing fatigue; (3) the type that consists primarily of a recital of the attorney's thoughts and beliefs in lieu of more substantial authority. When a lawyer reads his brief to the court, he is not making an oral argument; he is either intimating that the court doesn't know how to read, or confessing that his brief is so dismally dull and stuffy that no judge would read it voluntarily. There is one sound educational basis for an oral argument: it affords a lawyer the opportunity of hearing the most persuasive, the most eloquent, the best delivered argument in the world—the one he hears himself making to the court.

There are many illusions in the legal profession, some pleasing, some harmless, some good. The good illusions are those which serve humanity by assisting the lawyer in attaining the satisfaction of living a useful life, by assisting the profession in maintaining its distinguished influence in the community, by assisting the judiciary in performing its functions with dignity and justice. Good illusions are cousins to fine ideals: they both make the world a better place in which to live, notwithstanding the unattainability of ideals, notwithstanding the bit of fantasy in illusions.

The Notre Dame Program

(Continued from page 616)

How does our use of problems in the classroom differ from the hypothetical questions with which every law student long has been familiar? For one thing, the conventional hypothetical begins where the discussion of a particular case leaves off, changing this or that fact or circumstance in order to illustrate the instructor's discourse upon the genesis and development and, perhaps, the probable future direction of a given rule of law. Our problems, on the contrary, are problems in their own right, not merely appendages to a particular case in the book. They are stated in full circumstantial detail; and contain, by design, an admixture of irrelevant facts and circumstances. Their solution may require a grasp not of this or that case only but of every case in the assignment and, indeed, of cases in earlier assignments as well. Thus they are not designed merely to illustrate points made by the instructor. They are intended to be grappled with and worked out by the students, on their own, on the basis of what they should have gotten out of the assigned material.

Again, as in the first year, the constant purpose is to draw the *whole class* into a Socratic dialogue with the instructor, whose principal task, now as then, is to ask penetrating questions—questions which will stimulate independent thinking by the students.

In addition to the problems thus discussed in class, research problems are assigned which the student must report on in writing. He has one such research problem in each second-year course. The assignments are made according to a schedule prepared by the second-year instructors, working in collaboration, so that the student is always at work on a research problem but never confronted by two or more at once.

In the third year only one research problem is assigned. The student is required to make a thorough study of a live legal problem, selected by him in consultation with a member of the faculty, and to write an acceptable report on it. The emphasis here is on research in depth.

To finish his research problems satisfactorily a student must necessarily go to the library. This is a further great virtue of the problem method. Before a man can use cases and other materials to advantage he has to find them. Nor is it enough merely to be able to find relevant materials in the library. A competent lawyer must know how to do this readily and with the greatest possible economy of time and effort. This, too, is an art and requires long practice.

Legal Writing . . . *A Lost Art*

The research problems have another advantage. They give the student practice in effective legal writing, seemingly almost a lost art.

To accomplish their purpose, however, it is obvious that the research problems must be carefully planned and that the student's work must be read, graded and then discussed with him. This is an essential part of the problem method as we understand it at Notre Dame.

Used with insight and imagination, this approach, with the problem as the focus, facilitates a grasp

by the student of the dynamic quality of law; brings home to him that, for every legal problem, competing solutions press for acceptance; helps him to weigh the justice and the practical consequences of each of the alternatives. In these ways the problem method makes for a greater appreciation by the student of the nature and potentialities of legal rules and principles.[12]

Thus at Notre Dame we pass from a case-method emphasis on analysis in the first year to a problem-method emphasis on synthesis in the second and third years; in other words, from learning how to master cases to learning how to master concrete legal problems.

It is evident that large classes would make it impossible to carry out effectively the program I have been describing. Hence we are committed to small classes. I am not sure what the optimum size is. At present our working hypothesis is that a class of thirty-five to forty is small enough for active student participation and yet large enough to insure adequate competition. So far as possible, therefore, we restrict the number of students in a class to approximately thirty-five. This is accomplished by dividing larger classes into sections.

Comprehensive Exams . . . *Teaching the Whole Law*

To make law intelligible to students, it is broken down into courses. Though the generally accepted categories, it may be, could be improved, some such fragmentation is obviously necessary. But it has disadvantages and they are very great. Students think in terms of one course at a time and have the utmost difficulty in seeing from one subject to another.

At Notre Dame we have instituted a system of comprehensive examinations aimed at this difficulty. Course examinations at the end of each semester are still given, though the customary procedure has been modified to the extent that each examination contains questions from several courses and there is no label putting the student on notice that a particular question has to do with a particular course. The comprehensive examinations are in addition to the course examinations. Except in the first year, each comprehensive examination covers the work of three semesters; and each comprehensive question involves more than one course. Thus a single question will involve, for example, torts and agency, or contracts and corporations, or jurisdiction, procedure and evidence.

Just about every question that confronts a practitioner is a comprehensive question in that it involves more than one of the traditional legal categories. Yet the conventional law-school examination question is addressed to a single subject only, a subject that is identified for the student in advance. Suppose the medical schools addressed themselves to the cure of disease on the assumption that a patient never has more than one illness at a time and, therefore, that the role of the physician is to cope with a single disorder only in an otherwise healthy person. Would not that seem unrealistic? On the same principle, we have concluded that comprehensive examinations are a valuable teaching tool.

Our comprehensive examinations give great importance to systematic and continuous review; and this, in turn, helps to bring subjects already covered into juxtaposition with those currently under study. Thus both the comprehensive questions themselves and the review they make necessary facilitate and deepen the student's understanding by helping him to see the law as an organic whole rather than as a succession of unrelated courses.

Legal Education . . . *Training for Leadership*

I have been talking about legal education on the technical level, that aspect of it, in other words, which aims at producing technical proficiency. But technical proficiency is not enough. For, in the eloquent words of an eminent practitioner,

> Under a government of laws the lives, the fortunes and the freedom of the people are wholly dependent upon the enforcement of their constitutional rights by an independent judiciary and by an independent Bar.
>
> The legal profession is a public profession. Lawyers are public servants. They are the stewards of all the legal rights and obligations of all the citizens.[13]

In short, the "why" is no less important than the "what" and the "how" of legal education. It will not do to train men who are mere legal technicians. At Notre Dame we believe that law schools must face up to the great questions concerning the nature of man and society, the origin and purpose of law and the lawyer's role in society.[14] These ques-

12. *Cf.* Vanderbilt, *The Future of Legal Education*, 43 A.B.A.J. 207,209 (March, 1957): "It is only by exploiting the problem method to the utmost in the second and third years of law school that I see any possibility of our being able to teach the law as a system along with the art of legal reasoning within the limits of the three-year law school course."

13. Smith, *Survey of the Legal Profession: Its Scope, Methods and Objectives*, 39 A.B.A.J. 548 (1953).

14. McCoy, *The Legal Profession—a Pedagogical Stepchild*, 29 So. Calif. L. Rev. 322, 325-26 (1956): " 'Education,' said Oliver Wendell Holmes in 1886, 'other than self-education, lies mainly in the shaping of men's interests and aims. . . So I say the business of a law school is not sufficiently described when you merely say that it is to teach law or to make lawyers. It is to teach law in the grand manner and to make great lawyers.' But how can one teach law in the grand manner or how can a lawyer be great unless the teacher imparts and the prospective lawyer at the beginning of his studies absorbs into his very bones a knowledge and understanding of the nature and purpose of law and the role of the lawyer in relation to the public and the administration of justice?"

tions are given searching examination in our curriculum, particularly in a course on the history of the legal profession in the first year, a natural law seminar in the second year and a course on jurisprudence in the third year. The first of these is without counterpart, so far as I know, in any other American law school. This course is described in our Bulletin as follows:

> *History of the Legal Profession*—Legal history is still written in terms of kings and courts and official acts: it should be written around practicing lawyers. That is the approach which is taken in this course. The origin of lawyers is traced and their position and function in society throughout the ages examined. In the process the student is introduced to the great men of the profession who have advanced the cause of human freedom within the framework of orderly government. Particular attention is directed to the contribution made by lawyers to the rise of Western civilization and the development of Western thought. The course concludes with an examination of the Canons of Professional Ethics, for the Canons reflect the principles and ideals, the courage and devotion of the great lawyers who have made the practice of law a learned profession dedicated to justice.

Thus, as our Bulletin puts it, the Notre Dame Law School "systematically endeavors to illuminate the great jurisprudential issues which, especially in this fateful age, insistently press for answer; and to make clear the ethical principles and inculcate the ideals which should actuate a lawyer. The School believes that a lawyer is best served, and the community as well, if he possesses not only legal knowledge and legal skills but also a profound sense of the ethics of his profession—and something else which the curriculum is likewise designed to cultivate: pride in the legal profession and a fierce partisanship for justice."

How is all this brought down to the level of the practical, workaday world? By inculcating the approach to legal problems which I shall try to describe in the next paragraphs.

The complex phenomenon which lawyers know as law is an always unfinished product. It may be compared to a tapestry the weaving of which is never done, which repeats many of the patterns of the past but is constantly adding new patterns and variations on old patterns. Every lawyer, whether on or off the bench, has a part in the weaving of this tapestry and in the process is confronted by an endless succession of questions for which there is no simple, ready-made answer. In every case there are problems of appraisal, evaluation and choice which—whether practitioner or judge—a man must somehow solve for himself. Is this case really comparable to that? Does a certain circumstance present here, not present there, alter the picture essentially or only in an immaterial detail? These authorities present a persuasive analogy; those point just the other way. Always, in short, there is more than one possible outcome pressing for acceptance. A *choice* must be made.

How? On what basis? To begin with, the alternatives must be tested in the light of all available facts, including the data of comparative law, the social sciences and any other fields of learning that may be relevant in a given case. I am not suggesting that law schools should attempt to teach non-law subjects. *Law* is what law schools should teach; but it cannot be taught as we think it needs to be taught without cultivating on the part of the student an awareness of law's dependence on all the other disciplines.

When they have been illuminated by all available factual information, how are the various alternatives to be evaluated? The criteria are workability and justice. What is workable is not necessarily just, but that can hardly be just which is unworkable. Initially, therefore, the inquiry concerns practicability, viability. From there it moves to the greater question of justice. In the words of Chief Justice Warren, "it is in the nature of man to seek justice, and the basic purpose of any good legal system is to provide it".[15]

But what *is* just in the context of a concrete situation? No definition can determine that question. Its answer can come only from a conscience informed by the traditions and ideals of the legal profession, by the values and aspirations of our constitutional democracy and by the principles of natural law. At Notre Dame, it goes without saying, these principles, aspirations, values and ideals are illumined by the Christian tradition of which we are a part.

We conceive it our duty to habituate students to seeing in this perspective and approaching in this way the problems of choice they will never cease to encounter as long as they follow the law.

What I have written is enough, I hope, to make clear the main outlines of the Notre Dame program of legal education. I make no claim of novelty for any individual feature of the program. Its merit, in our view, consists in the drawing together of its component parts into a coherent, purposeful, institutional program dedicated to the training of lawyers who are at once skilled craftsmen and equipped for effective leadership at a critical juncture in the affairs of men.

15. 15 LEGAL AID BRIEF CASE 27 (1956).

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Activities of Sections

(Continued from page 654)

ward a clarification of this problem.

Alfred F. Conard, Professor of Law at the University of Michigan Law School, reviewed the efforts of his Committee on Simplification of Security Transfers by Fiduciaries and discussed the Committee's Model Act which is being sponsored in a number of jurisdictions, particularly in Illinois, which is expected to adopt it. Professor Conard also stated that the Model Act will be considered by the National Conference of Commissioners on Uniform State Laws at its New York state meeting.

A final paper was given by Francis P. McGuire, of the Connecticut General Life Insurance Company of Hartford, Connecticut, on "Basic Estate Planning". Mr. McGuire outlined the importance of the attorney's making a complete inventory of the client's estate in preparing his will. He further indicated various methods of testamentary and inter vivos disposition of property to effect tax savings.

The Council of the Section met on Saturday, May 11, to complete its programs for the New York and London meetings.

Edward C. King, Chairman of the Section, later announced the program for the meetings. The following are the topics to be presented on Friday, July 12, in the Jade Room of the Waldorf-Astoria:

"Title and Marketability Problems Occasioned by Abandoned Rights of Way", Willard L. Eckhardt, Columbia, Missouri;

"Effects of Rights of Entry and Restrictive Covenants on Marketability of Title", John C. Payne, University, Alabama;

"The Disposition of Oil and Gas Interests", Cecil N. Cook, Houston, Texas;

"New Developments in Zoning", Allison Dunham, Chicago, Illinois;

"Constructive Trusts in Probate Proceedings", Paul E. Iverson, Los Angeles, California;

"Estate Planning, 1957—The Lawyer Quarterback", Harrison F. Durand, New York, New York;

"Taxation of Parents on Trust Income Paid to Children", William K. Stevens, Chicago, Illinois;

"The Trustee, the Stock Market and the Measure of Damages", Daniel G. Tenney, Jr., New York, New York.

Members attending the London meeting will hear, on July 26 at the Grosvenor House, two British barristers who will give a discussion of great interest to the profession:

"Public Control of Land", R. E. Megarry, Q. C., Lincoln's Inn;

"The Bread and Butter Practice of the Average Solicitor", Edward F. George.

SECTION OF JUDICIAL ADMINISTRATION

The Section of Judicial Administration sponsored an outstanding program at the Denver Regional Meeting on May 9 and 10, 1957. This program was planned and conducted jointly with the Annual Meeting of the Judicial Conference for the Tenth Circuit.

On Tuesday, May 9, Associate Justice Brennan of the United States Supreme Court spoke at a judicial luncheon on the subject of court administration.

The afternoon session of the Section's program on May 9, 1957, was devoted to a symposium on pretrial which was held in the United States Courthouse. Mr. Justice Brennan again spoke briefly on the importance of pretrial in judicial administration. Duke Duvall, of the Oklahoma City Bar, and a member of the Tenth Circuit's Pretrial Committee presented a checklist for the guidance of the Bench and Bar in the pretrial of the mine-run tort cases. Melvin M. Belli, of the San Francisco Bar, followed with a discussion on the subject, "Is Pretrial Destroying the Art of Advocacy?"

On May 10, 1957, the Section of Judicial Administration again met jointly with the annual Judicial Conference of the Tenth Circuit. Judge Alfred P. Murrah reported on the activities of the group of federal judges appointed by the Chief Justice of the United States to make a special study of the so-called "big case". Judge Irving Kaufman of the United States District Court for the Southern District of New York followed with a report on pretrial activities in his district.